No. 13114

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WAIALUA AGRICULTURAL COMPANY, LIMITED,
Appellant

v.

CIRACO MANEJA, ET AL., *Appellees*

On Appeal from the District Court of the United States for the District of Hawaii.

BRIEF FOR APPELLANT

RUFUS G. POOLE,
1625 K Street, N. W.,
Washington 6, D. C.

LIVINGSTON JENKS,
Anderson, Wrenn & Jenks,
Bank of Hawaii Bldg.,
Honolulu 1, T. H.

MILTON C. DENBO,
1625 K Street, N. W.,
Washington 6, D. C.

ERNEST C. MOORE, JR.,
302 Castle & Cooke Bldg.,
Honolulu, T. H.
Attorneys for Waialua Agricultural Company, Limited

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BRIEF FOR APPELLANT

NATURE OF ACTION

This is the second appeal to this court in this action. The action was originally brought by Waialua Agricultural Company, Limited, hereinafter called the appellant, as a class action under Rule 23(a) of the Federal Rules of Civil Procedure and was instituted pursuant to Section 274d of the Judicial Code, now set forth as 28 U.S.C. section 2201, to secure a declaratory judgment. The defendants named in the original complaint were (a) employees of appellant, (b) a union which was the collective bargaining representative of such employees, and (c) a union official. The court was requested to declare the rights of the parties in a controversy relating to the judicial construction of Sections 3(b), 3(f), 3(j), 7(a), 7(c), and 13(a)(6) of the Fair Labor Standards Act of

1938 (the Act of June 25, 1938, 52 Stat. 1060, 29 U.S.C. sections 201 *et seq.*) hereinafter sometimes called the Act. The defendants filed a counterclaim under Section 16(b) of the Act to recover unpaid overtime compensation for work performed by them as employees of appellant and to recover liquidated damages, costs, and attorney's fees, but the district court ordered a separate trial of said counterclaim to take place subsequent to the court's determination of the issues presented by the declaratory judgment aspect of the action.

Following a trial of the action for declaratory judgment, a decision of the district court (77 F. Supp. at 480), and an appeal to this Court, the action was remanded by this Court to the district court for further proceedings (178 F. (2d) 603).

Upon remand all pleadings were amended by the parties so as to limit the action to the period November 20, 1946, to and including September 14, 1947 (R. 7, 10, 16-18), and were further amended, with the approval of the district court, so as to eliminate the class representation aspects of the action and to drop certain parties defendant (R. 4-5). The parties defendant left in the action were 42 individuals employed by the appellant during all or part of said period. Forty of these individuals are the appellees herein, the other two not being involved in the appeal because the district court held that they were exempt from the overtime requirements of the Act under Secs. 13(a)(6) and 3(f) during said period, and no appeal was taken by any party from such holding (R. 308-10, 325, 339).

Pursuant to an order of the district court following the remand, all issues presented in the declaratory judgment action and in the appellees' counterclaim were tried in a single trial (R. 5-6).

In conformity with the directions of this Court (178 F. (2d) at 606-607, 608, 614), following the remand, a Record was made showing the following with respect to each employee defendant:

1. The particular workweeks worked by him during the period of time covered by the litigation.
2. The number of hours worked by him in each such workweek.
3. His compensation in each such workweek including the amount of overtime compensation paid him and the number of hours for which such overtime compensation was paid.
4. A description of the duties performed by him in each such workweek.

And the district court entered detailed findings of fact (R. 190 *et seq.*, 308 *et seq.*) as to each appellee which showed the following:

1. The workweeks during the period of time covered by the litigation which were not in controversy either because the appellee had not worked in excess of 40 hours in any such workweek or because, if he had worked such excess hours, he had received overtime compensation therefor at the rate of time and one-half his regular hourly rate of pay pursuant to the collective bargaining contract applicable to his employment.
2. As to each of the other workweeks during the period of time covered by the litigation, which weeks were in controversy, a detailed description of the work performed by the appellee, the number of hours worked by him, his regular hourly rate of pay, whether or not he had received overtime compensation for hours of work in excess of 40,[1] and whether or not he was exempt under either Section 13(a)(6) or Section 7(c).[2]

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[1] In the case of some appellees there were certain workweeks when they received overtime compensation for hours of work in excess of 40 per week, but there is a controversy between the parties as to whether appellant was obligated under the Act to pay such overtime e.g., R. 311 (appellee Hernandez), 315 (appellee Cumlat) and 318 (appellee Hamamoto).

[2] As the district court found, appellant paid overtime to all appellees for hours worked by them in excess of 48 in a workweek, and therefore the recovery of overtime pay sought in this action by appellees is limited to hours in excess of 40 per week, up to and including 48. 97 F. Supp. at 219. Appellant's payment of overtime for hours in excess of 48 in a week was made pursuant to the applicable collective bargaining contract. (R. 141, 143).

JURISDICTION

Jurisdiction was conferred upon the district court by (a) Section 24 of the Judicial Code as amended, now set forth as 28 U.S.C. section 1337, (b) Section 274d of the Judicial Code, now set forth as 28 U.S.C. section 2201, and (c) Section 16(b) of the Fair Labor Standards Act of 1938. The pleadings necessary to show the existence of the jurisdiction and setting forth the controversies between the parties are: (a) Amended Complaint (R. 6-15); (b) Amendment to Amended Complaint (R. 181-184); (c) Answer to Amended Complaint, and Counter-claim, Cross-Claim, and Cross-Complaint (R. 16-19); (d) Reply and Answer to Counter-Claim, Cross-Claim, and Cross-Complaint (R. 20-24); and (e) Amendment to Answer to Amended Complaint, and Counter-Claim, Cross-Claim, and Cross-Complaint (R. 24-26). The Opinion and Decision of the district court are reported at 97 F. Supp. 198. The district court also entered findings of fact and conclusions of law (R. 190 *et seq.*, 308 *et seq.*) which are not reported. Likewise the Judgment of the district court (R. 321 *et seq.*) is not reported. This Court has jurisdiction to review the judgment below under Sections 116 and 128 of the Judicial Code as amended, the pertinent parts of which are now set forth as 28 U.S.C. sections 41, 1291, 1294.

STATUTORY PROVISIONS INVOLVED

The provisions of the Fair Labor Standards Act involved are Sections 3(b), 3(f), 3(j), 7(a), 7(c), and 13(a)(6). These will be set forth in full or in relevant part in appropriate places in the Argument, *infra*.

STATEMENT OF THE CASE

All material facts in this action found by the district court are set forth in a lengthy Stipulation of the parties (running 771 pages) filed in the district court on August

30, 1950, hereinafter cited as "Stip."[3] Of the 48 defendants below 22 testified orally, and all supported the truth and accuracy of the Stipulation except in certain minor respects (e.g. R. 409-410, 423-424, 434-435, 446-447, 458-459. See also R. 615-617, 619, 620-621.) In such minor respects the Stipulation was thereafter amended by the parties to conform with such oral testimony (R. 179-181; Amendment to Stipulation filed September 5, 1950. See also R. 618-619.)[4] Twenty of the 22 defendants who testified orally are among the appellees herein. The other

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[3] This Stipulation has not been printed in full in the printed record, although it is among the original papers transmitted to this court by the district court (R. 341, 671). By order of this Court dated November 28, 1951, the parties were excused from printing such Stipulation in full but the Court nevertheless ordered that it should be treated under Rule 19, ¶6 of the Court's Rules as part of the Record to be considered on this appeal. (R. 713-16, 719) The parts of the Stipulation, which are printed in the printed record, are (a) Part I, containing an overall description of the appellant's plantation and its operations; (b) those portions of Parts II and III, containing a description of and other data relating to the work and duties of the appellees, which the appellant deemed necessary to show the error in various findings of the district court, and (c) exhibits A, B, D, F, G, H, & I attached to the Stipulation. (R. 27-178, 721-724). On the other hand, there has been omitted from printing those portions of Parts II and III of the Stipulation which are adequately and correctly covered by the district court's findings (R. 190, *et seq.*). All page references in this brief to the parts of the Stipulation not printed are to the pagination of the Stipulation as filed in the district court and not to the pagination of the Stipulation as it appears in the original record certified to this Court.

[4] There were two amendments to the Stipulation (R. 179 and 186). The first of these, entitled "Amendment to Stipulation," consists almost wholly of a further elaboration of the work and duties of the appellees. Like the Stipulation itself, this Amendment to Stipulation has not been printed in full in the printed record, although it too is among the original papers transmitted to this Court (R. 341, 671). The parts printed are those which the appellant deemed necessary to show the error in various findings of the district court. (R. 179-181). Again, this Court by its order of November 28, 1951, excused the parties from printing said Amendment to Stipulation in full but ordered that it should nevertheless be treated under Rule 19, ¶6 of this Court's Rules as part of the Record to be considered on this appeal. (R. 716-17, 719).

two were those held exempt by the district court from the overtime requirements of the Act during all workweeks of the period covered by the litigation under Sections 13(a) (6) and 3(f). *Supra*, p. 2.

The facts agreed to by the parties, applicable to the period involved herein (R. 123), show that

Appellant operates a sugar plantation on the island of Oahu. Since 1898 appellant has been engaged almost exclusively in the growing, cultivating, and harvesting of sugar cane on land owned or leased by it (R. 31) and the processing of such sugar cane into raw sugar and molasses on the plantation where produced (R. 30, 31, 38-39, 721). *The appellant processes no cane except that grown by itself on its plantation* (R. 84), nor does it engage in any sugar refining operations (R. 32).[5] Substantially all of the land (9,663 acres) now devoted to sugar cane production has been owned or leased and used by appellant for this purpose since 1910 (R. 33).

On its plantation appellant prepares and plows the fields for the planting of sugar cane; plants sugar cane; ratoons the fields;[6] cultivates sugar cane; applies fertilizer to the cane fields; irrigates cane fields by a network of irrigation ditches and water storage reservoirs; harvests sugar cane; maintains a network of field roads (which criss-crosses the cane-growing land (R. 35)) for the transportation by truck of labor, field supplies and equipment throughout the plantation; and transports sugar cane by a narrow-gauge railroad (which also criss-crosses the cane growing land (R. 35)) from the fields where grown to the appellant's mill.[7] These operations

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[5] The court below found that appellant does not "directly" engage in any sugar refining operation. 97 F. Supp. at 203. This finding is erroneous because the Record shows clearly that appellant does not engage in any such operation, directly or indirectly.

[6] "Ratooning" refers to operations performed after a field is harvested to prepare it for the growing of another crop (R. 42).

[7] The parties have stipulated that the term "mill" means the building and equipment of the appellant used in the actual processing of sugar cane into raw sugar, including cane carrier, cane

are more fully described in the Stipulation (R. 39-66).

The appellant's mill is located on its plantation (R. 38). At the mill the appellant grinds the sugar cane which it produces into raw sugar and molasses and loads bagged raw sugar and molasses for shipment to the continental United States, or stores such products temporarily in the sugar warehouse or molasses tanks (R. 66-82, 84-85). The loading of the bagged raw sugar and of the molasses into the railroad cars of an independently owned and operated carrier at the site of the mill, and the pushing of such cars from such site onto a nearby spur of the carrier complete the operations of the appellant and the work of its employees relative thereto (R. 31-32, 59).[8]

Appellant has equipped and maintains complete service shops for prompt minor repairs and emergency work and major overhaul of field and processing machinery, equipment and facilities indispensable to its growing, harvesting and processing operations. These service repair shops are located in an area extending not more than 300 feet from the mill building proper (R. 94, 723).

Appellant owns and maintains 820 dwelling houses, all of which are located on the plantation (R. 120); and various facilities and services, including firewood, water, electricity, sewage disposal, street maintenance and cleaning, and recreational facilities are provided the occupants of such dwelling houses (R. 118, 119). These dwelling houses are occupied by 3373 persons, of whom 2952 are employees and pensioners of the

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cleaning plant and scales, crushing plant, boiling house, fireroom, power plant, sugar warehouse and molasses tanks, and all equipment therein (R. 31).

[8] The carrier referred to discontinued its operations at the end of the year 1947. Such carrier had previously been used not only to carry the appellant's bagged raw sugar and molasses but also to deliver incoming plantation supplies and equipment. The outgoing and incoming freight of appellant's plantation are now handled by an independently owned and operated trucking company (R. 59-60).

appellant and their families. The remaining 421 persons living in such houses are lessees and their families who are not employed by the appellant and who either work off the plantation or who own, operate or are employed by independently controlled businesses within it (R. 120-121). No employee, including each of the appellees herein, is required as a condition of employment to live on the plantation or in plantation dwelling houses or to use any service or facility which the appellant furnishes or renders its employees (R. 120). The relationship which exists between the appellant and its employees by virtue of the occupancy of such houses, including each and every employee appellee herein, is that of landlord and tenant (R. 120).

For the convenience of the court in understanding our Argument, we set forth below the groups of activities which appellees performed for appellant:

1. *Field work and repair and maintenance of field equipment*: (i) preparation of land for planting, planting, ratooning, cultivation, fertilizing, irrigation, harvesting, and maintenance of field roads (appellees Maneja, Asuncion, Hayashi, K. Okouchi, Watanabe (R. 191-204) and appellee Crisostomo (R. 279-283)); (ii) repair, servicing, and maintenance of field equipment and implements, such as tractors, tractor auxiliary implements, caneloading machines, and pumps and other irrigation equipment (appellees last mentioned and also appellees Ezawa (R. 231-235), Reyher (R. 239-243), A. Robello (R. 273-276), Tanaka (R. 227-231), Takata (R. 243-248), Hironaka (R. 266-273), Yamada (R. 277-278), and Sunahara (R. 223-226).

2. *Hauling and repair and maintenance of hauling equipment*: (i) hauling by narrow gauge railroad of sugar cane from fields to mill (appellee Holmberg (R. 205-206); (ii) hauling by truck on field roads of laborers and field supplies and equipment used for planting, cultivation and harvesting (appellees Guigui (R. 235-239), Vierra (R. 248-256), and Crisostomo (R. 279-283)); (iii) miscellaneous hauling such as hauling by truck of laborers, supplies, and equipment to different places on plantation (appellees

Guigui (R. 235-239), Vierra (R. 248-256), and Crisostomo (R. 279-283)) (some of this latter type of hauling consisted of hauling from off the plantation to places on the plantation); (iv) repair, servicing, and maintenance of hauling equipment and facilities such as cane cars, locomotives, trucks, and the plantation railroad, including portable tracks (appellees K. Okouchi (R. 198-201), Holmberg (R. 205-206), Faria (R. 206-208), Sera (R. 208-210), T. Okouchi (R. 210-212), Claunan (R. 220-223), Sunahara (R. 223-226), Tanaka (R. 227-231), Takata (R. 243-248), Mori (R. 264-265), Hironaka (R. 266-273), and A. Robello (R. 273-276).

3. *Sugar Cane Processing and Repair and Maintenance of Processing Equipment*: (i) Processing of sugar cane at mill and temporary storage, loading, and shipment of raw sugar and molasses (appellees Hernandez, Dumlao, Kondo, Cumlat, Lazo, and Kubo (R. 310-317); Carrit and S. Robello (R. 216-220); and Hamamoto (R. 317-318)); (ii) repair, servicing, and maintenance of mill and its equipment (appellees last mentioned and also appellees Oato (R. 212-216), Sunahara (R. 223-226), Tanaka (R. 227-231), Takata (R. 243-248), and Hironaka (R. 266-273)).

4. *The making of concrete irrigation flumes,* water supply pipe, blocks, and other concrete products required for use on the plantation (appellee Tsutsui (R. 257-258)).

5. *Storage of supplies and equipment* for field, hauling, mill, and repair activities of appellant (appellee Yack Chun Lee (R. 318-319)).

6. *Laboratory work* for (i) field operations of appellant (appellee Pacheco (R. 285-286)) and for (ii) hauling, processing, and activities referred to in "8", *infra* (appellee Fujiwara (R. 286-288)).

7. *Office work* (appellee Sakaguchi (R. 319-320)).

8. *Repair and maintenance of appellant's dwelling houses* and the furnishing, maintaining, repairing, or servicing of related domestic services or facilities to or for the lessees of such dwelling houses (appellees Sakai (R. 256-257), Kashiwabara (R. 259-263), Mori (R. 264-265), Yamada (R 277-278), Fernandez (R. 284), Crisostomo (R. 279-283), Oato (R. 212-216), Hironaka (R. 266-273), Guigui (R. 235-239), and Vierra (R. 248-256).

Certain appellees performed work in only one group of activities in every workweek and are therefore listed only in that group. This is true, for example, of the employees who are grouped under sugar cane "Processing," *supra.* On the other hand, certain appellees in some workweeks performed one group of activities exclusively, but in other workweeks performed a substantial amount of work in two or more groups of activities. For example, appellee Yamada in certain workweeks did carpentry work in repairing appellant's dwelling houses (R. 277, 278) and did nothing else. In other workweeks, however, he did both such carpentry work on dwelling houses and also repaired irrigation equipment (*Id.*). Accordingly, he is grouped both under "Field work" and "Repair and maintenance of appellant's dwelling houses," *supra.* Still other appellees did a substantial amount of work in many workweeks which fell into several groups of activities, and in no workweek did work that fell into one group exclusively, e.g., appellees Hironaka (R. 266-273), Takata (R. 243-248), and Tanaka (R. 227-231). They are therefore placed in several groups.[9]

Opinion and Decision (Including Findings of Fact and Conclusions of Law) and Judgment of District Court

The district court wrote a lengthy opinion (97 F. Supp. 198), and, as we have pointed out, *supra,* p. 3, also entered detailed findings as to each appellee. It then entered a Judgment (R. 321 *et seq.*), holding that each appellee was engaged in commerce or in the production of goods for commerce within the meaning of Section 7(a) of the Act during each workweek of the period of litigation (R. 322). The court further held with respect to each appellee (and as to the workweeks in controversy as to him) those workweeks when he was, and those when

[9] In various instances appellees who did only minor amounts of work within a particular group of activities are not listed above as within the group. Complete information as to the work done by all of the appellees within the various groups appears in the findings of fact (R. 190 *et seq.*, 308 *et seq.*)

he was not, exempt from the provisions of Section 7(a) pursuant to Section 13(a)(6) or Section 7(c) (R. 322 *et seq.*).

In this connection and with particular reference to the "agriculture" exemption provided by Section 13(a)(6), the district court held that when appellant had finished growing its sugar cane crops and proceeded to haul such crops from the fields where grown to its mill on the plantation, it ceased to be a farmer and became a carrier. 97 F. Supp. at 218, 222. Accordingly, appellees engaged in such hauling were not within the exemption. Similarly, the court held that after the crops reached the mill on the plantation and appellant processed them into raw sugar, it ceased to be a carrier and became a manufacturer (97 F. Supp. 218, 222), and therefore the appellees engaged in such processing were likewise not under the "agriculture" exemption. The court also held that so far as the repair shops of appellant were concerned, they were an integral part of the overall combination of separate enterprises, i.e., farming, hauling, and manufacturing, conducted by the appellant and hence appellees doing the repair work were also not exempt. 97 F. Supp. 225.

The court in its Judgment further held that if in any workweek an appellee performed work which was exempt from the overtime provisions of the Act by virtue of Section 13(a)(6) or Section 7(c), the exemptions would be lost in that workweek if the appellee also did any other work not so exempt, regardless of how insubstantial such other work was (R. 336).

Finally and based upon its holdings as aforesaid, the court awarded unpaid overtime compensation, liquidated damages, costs of the action, and attorney's fees to the appellees as claimed by them in their counterclaim (R. 336-338).

QUESTIONS PRESENTED

The basic question presented by this appeal is whether the 40 appellees were entitled to overtime compensation

under the Act for all hours worked by them over 40 in all or any of the workweeks covered by the litigation.

Stated more precisely the issues presented are the following:

1. Whether the appellees were exempt from the overtime provisions of the Act by virtue of Sections 13(a)(6) or 7(c) during all or any of the workweeks covered by the litigation.

2. Whether the appellees were excluded from the overtime provisions of the Act by virtue of their not being "engaged in [interstate] commerce or in the production of goods for [interstate] commerce" as the terms "commerce" and "produced" were defined in Sections 3(b) and 3(j) [10] of the Act when they were engaged in: (a) repairing and maintaining appellant's dwelling houses located on the appellant's planation, and (b) furnishing, maintaining, repairing or servicing related domestic services or facilities (firewood, water, electricity, bath houses, sewage disposal, street maintenance and cleaning, parks and playgrounds, clubhouse and other recreational facilities) to or for the lessees of such dwelling houses who included both employees of appellant and others.

3. Whether if during the same workweek an appellee performed work, some of which was exempt under Section 13(a)(6) and the remainder exempt under Section 7(c), or performed work, some of which was not an engagement in interstate commerce or in the production of goods for interstate commerce and the remainder of which was exempt under Section 13(a)(6) or Section 7(c), he was exempt for that workweek from the overtime provisions of the Act.

4. Whether if during the same workweek in the period covered by the litigation an appellee engaged in an activity exempt under Section 13(a)(6) or Section 7(c) of the Act and did not engage for a substantial part of his time in the same workweek in an

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[10] Sections 13(a)(6), 7(c), 3(b) and 3(j) were all amended by the Fair Labor Standards Amendments of 1949 (63 Stat. 910) effective January 25, 1950. The amendments do not affect the controversy here, which antedates such amendments (*Supra*, p. 2).

activity not so exempt, he was exempt for that workweek from the overtime provisions of the Act by virtue of Section 13(a)(6) or Section 7(c).

SPECIFICATION OF ERRORS

A. The district court erred as follows with respect to the workweeks affected by the controversy in this action:

1. In holding that each and every appellee was engaged in interstate commerce or in the production of goods for interstate commerce within the meaning of Section 7(a) of the Act in each such workweek, and in failing to hold that each such appellee was not engaged in interstate commerce or in the production of goods for interstate commerce when he was engaged in: (a) repairing and maintaining appellant's dwelling houses located on the appellant's plantation, and (b) furnishing, maintaining, repairing or servicing related domestic services or facilities (firewood, water, electricity, bathhouses, sewage disposal, street maintenance and cleaning, parks and playgrounds, clubhouse and other recreational facilities) to or for the lessees of such dwelling houses who included both employees of appellant and others.

2. In holding that an appellee was not "employed in agriculture" within the meaning of Section 3(f) and therefore was not exempt from the overtime provisions of the Act as provided by Section 13(a)(6) when he was engaged in any of the following: (a) hauling of sugar cane produced by appellant from the fields to the mill and repairing, maintaining, and servicing equipment and facilities used in such hauling; (b) grinding such sugar cane at the mill into raw sugar and molasses, and repairing, maintaining, and servicing the mill and its equipment; (c) temporarily storing, loading, and shipping such raw sugar and molasses; (d) repairing and maintaining field implements, and (e) such other incidental operations as were necessary and indispensable to the foregoing, such as hauling and storing supplies, materials and equipment, and laboratory and office work for appellant's field, hauling and processing operations.

3. In holding that an appellee was also not exempt

from the overtime provisions of the Act under Section 7(c) when he was engaged in any of the following: (a) hauling of sugar cane produced by appellant from the fields to the mill and repairing, maintaining, and servicing equipment and facilities used in such hauling; (b) repairing, maintaining, and servicing the mill and its equipment, and (c) such other incidental operations as were necessary and indispensable to the foregoing or to the grinding of sugar cane produced by appellant at the mill into raw sugar and molasses, or to the temporary storage, loading, and shipment of same, such as the hauling or storage of materials, supplies and equipment, or laboratory and office work.

B. The district court erred in failing to hold as follows with respect to the workweeks affected by the controversy in this action:

1. That an appellee was exempt from the overtime provisions of the Act during any workweek in which

(a) he performed work, some of which was exempt from Section 7(a) under one provision of the Act and the remainder of which was exempt from Section 7(a) under another provision or other provisions of the Act, or

(b) he performed work, some of which was not in "[interstate] commerce" or in the "production of goods for [interstate] commerce" within the meaning of Section 7(a) and the remainder of which was exempt from Section 7(a) under any provision or provisions of the Act.

2. That an appellee was exempt from the overtime provisions of the Act during any workweek in which he performed some work which was exempt from Section 7(a) of the Act and did not engage for a substantial part of his time in the same workweek in an activity which was not so exempt.

C. The district court erred in awarding any overtime compensation, liquidated damages, costs, and attorney's fees to appellees or any of them (R. 336-338).

D. The district court erred in relying upon and crediting defendants' Exhibits Nos. 2, 3A and 3B, which were

incompetent, irrelevant and immaterial. 97 F. Supp. at 203, 204, 205, 214, 216, 217, 221, 224.

E. The district court clearly erred in making findings of fact which are in conflict with the Stipulation of Facts submitted by the parties (R. 30 *et seq.* and Stip. pp. 87 *et seq.*) and are not supported by competent and substantial evidence, oral or documentary, introduced at the trial in the district court. Said clearly erroneous findings are set forth in Appendix A, pp. 79-90, *infra*.

ARGUMENT

I. THE APPELLEES WERE "EMPLOYED IN AGRICULTURE" WITHIN THE MEANING OF SECTION 3(f) AND THEREFORE WERE EXEMPT FROM THE OVERTIME PROVISIONS OF THE ACT AS PROVIDED BY SECTION 13(a)(6) WHEN THEY WERE ENGAGED IN ANY OF THE FOLLOWING DURING THE PERIOD COVERED BY THE LITIGATION:

(a) HAULING OF SUGAR CANE PRODUCED BY APPELLANT FROM THE FIELDS TO THE MILL AND REPAIRING, MAINTAINING, AND SERVICING EQUIPMENT AND FACILITIES USED IN SUCH HAULING;

(b) GRINDING SUCH SUGAR CANE AT THE MILL INTO RAW SUGAR AND MOLASSES, AND REPAIRING, MAINTAINING, AND SERVICING THE MILL AND ITS EQUIPMENT;

(c) TEMPORARILY STORING, LOADING, AND SHIPPING SUCH RAW SUGAR AND MOLASSES;

(d) REPAIRING AND MAINTAINING FIELD IMPLEMENTS; AND

(e) SUCH OTHER INCIDENTAL OPERATIONS AS WERE NECESSARY AND INDISPENSABLE TO THE FOREGOING.

Appellant contends that the agriculture exemption applied to appellees when engaged in hauling sugar cane to the mill, processing such cane into raw sugar and molasses, repairing the hauling and processing equipment and facilities, and such other incidental operations as were necessary and indispensable to the hauling, processing and repair activities, such as hauling and storing supplies, materials and equipment, and laboratory and office work for appellant's field, hauling and processing operations.[11]

The district court denied that appellees were within the agriculture exemption when engaged in any of such activities. The district court held that the agriculture exemption, as applied to appellees, was limited to field operations, and ended at the point where cane cars, loaded with harvested cane, left portable track in the cane fields and moved on to permanent rail tracks of appellant's narrow-gauge railroad to continue the transportation of such cane to the mill. (R. 59-62). 97 F. Supp. at 220-222.

The underlying philosophy which motivated the district court in so delimiting the agriculture exemption was its view that appellant was engaged in five separate businesses, namely, those of farmer, carrier, manufacturer, shipper, and operator of village communities. 97 F. Supp. at 218, 222, 225.

In the foregoing and in other respects, the district court's holding stands in sharp contrast with many com-

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[11] When this case was previously before this Court, this Court expressed concern that the first decision of the district court necessarily held that the carpenter who initially constructed a house for an Army officer on company property and the beauty operator who worked in a hotel for transients and the girl who took tickets at the moving picture house in a plantation village were engaged in commerce; and this Court further expressed concern over the possibility that appellant might claim that such persons were included under the agriculture exemption. 178 F. (2d) at 609. In the opinion of appellant, any such persons would not be engaged in commerce and also would not come within the agriculture exemption. None of the appellees was engaged in work of the types mentioned.

ments with respect to the application of the agriculture exemption which were made by this Court in its earlier opinion in this same case. Thus, this Court emphasized that

1. The agriculture exemption should not be construed technically, but broadly and liberally as is demanded by the nature of the subject and the unquestionable intent of Congress. 178 F(2d) at 608, 609.

2. Size, mechanization, and industrialization of appellant's operations were immaterial factors in determining whether the exemption applied to the individual appellees. *Id.* p. 610.

3. The application of the exemption should be determined for each workweek for each appellee solely on the basis of said appellee's work in each such workweek. *Id.* pp. 608, 611, 614.

4. The perishability of the crop, i.e., sugar cane, was an extremely pertinent fact in determining whether the agriculture exemption applied to the appellees when engaged in hauling such cane to the appellant's mill and in processing it into raw sugar. *Id.* p. 611.

5. The agriculture exemption in Section 13(a)(6) and the sugar processing exemption in Section 7(c) are not alternative or mutually exclusive. *Id.* p. 609.

The district court completely ignored the several comments of this Court as to how the agriculture exemption should be applied.[12] In fact, aside from stating that this Court had remanded the case to it, the district court made no mention of this Court's earlier exhaustive opinion herein.

Instead, as it had done in its prior decision (77 F. Supp. 480), the district court relied extensively upon defendants' exhibits Nos. 3A and 3B, which were introduced over appellant's objections (R. 650-652), in making its findings and reaching its legal conclusions (97

[12] The opinion of the district court is based almost entirely on the brief submitted to the district court by counsel for appellees, which brief also ignored the comments of this Court.

F. Supp. at 203, 204, 205, 214, 216, 217, 221, 224), notwithstanding that this Court had previously indicated that such exhibits were of no relevancy to the issues here involved. 178 F(2d) at 612. Said exhibits were two bulletins of the U. S. Department of Labor numbered 687 and 926, respectively.[13] Neither bulletin has any probative value. They were not introduced to prove what the appellees' activities were during the workweeks in issue, nor did the appellees make any effort to show that their activities during such workweeks were comparable to those described in the bulletins. And in fact nothing in either bulletin applies to the appellant or the appellees or their operations and activities; and said bulletins may not be relied upon to modify the stipulated facts. Furthermore, one of these bulletins, namely No. 687, was issued in 1939 and obviously, even if otherwise relevant, would be entitled to no weight in this case which pertains simply to the period November 20, 1946, to September 14, 1947.

A. The Courts Have Held the Agriculture Exemption To Be Far Reaching and To Include Many Activities Not Normally Regarded as Farming.

Section 13(a)(6) of the Act exempts from both the wage and hour provisions thereof "any employee employed in agriculture". Section 3(f) defines the term "agriculture" as follows:

> "'Agriculture' includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15(g) of the Agricultural Marketing Act, as amended), the

[13] While the parties have been excused from printing such exhibits, this Court has ordered them treated under Rule 19, ¶6 of this Court's Rules as part of the Record to be considered on this appeal (R. 711, 712), and copies thereof have been supplied the Court.

raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market."

It will be noted that the exemption starts with the growing of the agricultural commodity, continues with its harvesting, includes its preparation for market or delivery to storage, and ends with its delivery to market or to transportation for market.

In its only holding on the agriculture exemption in the Act the United States Supreme Court stated:

> "As can be readily seen this [agriculture] definition has two distinct branches. First, there is the primary meaning. Agriculture includes farming in all its branches. Certain specific practices such as cultivation and tillage of the soil, dairying, etc., are listed as being included in this primary meaning. *Second, there is the broader meaning. Agriculture is defined to include things other than farming as so illustrated.* It includes any practices, *whether or not themselves farming practices,* which are performed either by a farmer or on a farm, incidently to or in conjunction with 'such' farming operations" [Emphasis supplied]. *Farmers Reservoir Co.* v. *McComb,* 337 U.S. 755 at 762-763.

Thus the Supreme Court has made it clear that the exemption applies to all practices performed by a farmer or on a farm incident to or in conjunction with farming, whether or not such practices are themselves farming practices. And in an earlier decision the Supreme Court stated that "Employment in agriculture is probably the most far reaching" of the exemptions in the Act. *Addison* v. *Holly Hill Fruit Products,* 322 U.S. 607, 612.

This Court itself has recognized that the agriculture exemption in the Act must be construed broadly and liberally with respect to sugar cane farming. In its prior decision herein, it stated:

". . . the raising and harvesting of sugar were specifically given consideration by Congress on account of the immense importance to the economy of this country as a whole. The text of the Act itself, the debates over the meaning of provisions, and especially the broad phrasing of the exclusions, *indicates the intention that construction should be evenly balanced and not technical.* The text reflects the feeling that, in troublesome times, the need for sugar may momentarily become vital. . . . It must be remembered that the construction given to this Act by the Court as to Hawaii, although not conclusive, will be generally applied to wheat farms and sugar plantations in continental United States.

". . . As has hitherto been pointed out by this Court . . ., *these provisions relating to farming are exclusions, not technical exemptions to be construed in accordance with over-refined rules of pleading, but broadly and liberally as is demanded by the nature of the subject and the unquestionable intent of Congress.* This factor is directly applicable to the individual employee because the Act specially provides that the statute shall not apply to any employee who is engaged in agriculture" [Emphasis supplied]. 178 F.(2d) 608-609.

The size, mechanization and industrialization of particular activities are irrelevant factors in determining the application of the exemption. This Court so recognized in its earlier opinion in this case:

"It is probable that no feasible distinction can be drawn under the language of the statute between carriage by motor truck, railroad locomotives or other modern devices, and by water buffalo with carts, as the statutory cleavages are on other lines. . . . distinctions cannot be drawn on account of size. If a particular operation in transportation were done, according to the facts, by a farmer in harvesting, it would not fall under the statutory provisions even if the farmer were an agricultural giant such as Waialua" 178 F.(2d) at 610.

Other decisions hold that the agriculture exemption applies in accordance with its terms, notwithstanding the

mechanized or industrialized character of the operations involved: *Damutz* v. *Pinchbeck,* 66 F. Supp. 667 (D. Conn. 1946), 158 F(2d) 882 (C.C.A. 2),—agriculture exemption held to apply to fireman in greenhouse notwithstanding that the growing of horticultural products was highly mechanized; *Miller Hatcheries* v. *Boyer,* 131 F(2d) 283 (C.C.A. 8)—agriculture exemption held applicable to employees in a commercial chick hatchery located in a city notwithstanding that the hatching of baby chicks by a commercial hatchery is an industrialized activity; and *Bruno* v. *Hills Brothers Co.,* 7 Labor Cases, paragraph 61763 (D. Puerto Rico 1943)—agriculture exemption held applicable to employees engaged in canning and packing grapefruit and curing of citron raised by the employer on its own farms.[14]

Appellant's field operations are no less mechanized than its mill or hauling operations (R. 56-57, 115-116) and the district court so found, 97 F. Supp. at 204. Hence if mechanization of operations was determinative of the application of the exemption, exemption would be denied such obviously agricultural operations as plowing, planting, weeding, irrigating, or harvesting—all done by mechanized equipment.

The district court ignored the foregoing authorities and instead construed the agriculture exemption so narrowly that it denied exemption to the appellees when engaged in many activities which are commonplace, everyday activities of farmers, including hauling of crops to a

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[14] In denying the exemption, the district court relied on the size, mechanization and industrialization of appellant's transportation and processing operations, and the district court also relied upon such other irrelevant matters as the marketing of appellant's products through a cooperative refinery in California, the relationship of appellant to Hawaiian Sugar Planters Association, the relationship of appellant to its agent Castle & Cooke, Ltd., the departmentalization of appellant's operations, and the past prosperity of appellant. 97 F. Supp. at 203, 216-218, 221-222. Reliance on any of the foregoing matters was inconsistent with the rule that the agriculture exemption should be determined for each workweek for each appellee solely on the basis of said appellee's work in such workweek. 178 F. (2d) at pp. 608, 611, 614.

processing plant, processing the crops to prepare them for market, and repairing agricultural equipment, machinery, and implements. 97 F. Supp. at pp. 220-222, 222-223, 225.

The district court also appeared to take the view that the Section 13(a)(6) exemption should not include the sugar processing operation in which some of the appellees engaged, because there is a specific exemption for such sugar processing in Section 7(c). 97 F. Supp. at 221. But again this reasoning was contrary to the previous decision of this Court herein, when it said:

> "These provisions [Sections 13(a)(6) and 7(c)] are not alternative or mutually exclusive . . ." 178 F.(2d) at 609.

The agriculture exemption in Section 13(a)(6) and the processing exemption in Section 7(c) overlap in many significant respects. The overlapping of the two exemptions is fully understandable. Section 13(a)(6) is an exemption from both the wage and hour provisions of the Act, while Section 7(c) is an exemption from the hour provisions alone. Congress intended that if a farmer processes his own sugar cane crops, such processing should be exempt under Section 13(a)(6). On the other hand, if a person engages in the business of processing crops of others, such person was to enjoy only the more limited Section 7(c) exemption.

B. The Language of the Exemption, Which Includes (1) "Farming in All Its Branches" (2) "And Any Practices . . . Performed by a Farmer or on a Farm as an Incident to or in Conjunction with Such Farming Operations", Exempted the Work of Appellees Now In Question.

1. *"Farming in All Its Branches".*

Under the primary meaning of the agriculture exemption all branches of farming are exempt. The statutory language defining "agriculture" reads in relevant part:

> " 'Agriculture' includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities . . ."

As observed earlier, *supra,* p. 10, many of the appellees were engaged in a variety of tasks in all or many of the workweeks affected by the controversy in this action. Included among such tasks were the hauling of sugar cane produced by appellant from the fields to the mill on appellant's plantation; repairing, maintaining, and servicing equipment and facilities used in such hauling; grinding sugar cane produced by appellant at the mill; repairing, maintaining, and servicing the mill and its equipment; repairing and maintaining field implements; hauling laborers, materials, supplies or equipment; storing materials, supplies, or equipment; laboratory work; office work; and grading field roads. In performing such various tasks in any given workweek an appellee was engaged in sugar cane farming within the meaning of the exemption, as all such activities were a necessary and integral part of the appellant's operations of producing, cultivating, growing, and harvesting sugar cane. (R. 35-36, 94). All such activities were similar to the activities conducted by vast numbers of wheat farmers, cotton farmers, fruit and vegetable farmers, etc., in various areas of the country. This point was underscored by the American Farm Bureau Federation [15] in a brief *amicus* filed with this Court when the case was previously before it, in which the Farm Bureau explained that the activities of the appellees herein were "common everyday activities performed by most Ameri-

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[15] This is a non-profit general farm organization of more than 1,250,000 farm families in 45 states of the United States and Puerto Rico. Its objects are to promote, protect, and represent the business, economic, social, and educational interests of the farmers of the United States and generally to develop agriculture. See *Brief of Farm Bureau,* Appendix B hereto, page 92, *infra.*

can farmers and farms". *Brief of Farm Bureau,* Appendix B hereto, pp. 92-93, 96-97, *infra.*

The district court, denying the applicability of the agriculture exemption to appellees engaged in hauling, mill, repair, and many other activities of appellant, asserted that appellant is engaged in a number of separate and distinct enterprises, which, taken together, constitute a hybrid type of business, and that in the conduct of these enterprises appellant has assumed a variety of functions including those of farmer, carrier, manufacturer, and shipper. 97 F. Supp. at 218, 222, 225.[16] These statements betray an acute lack of understanding of the usual farming operations of farmers in the United States, its territories and possessions. All of appellant's activities now in question, as we have previously shown, are functionally identical with the activities conducted by untold numbers of farmers. *Brief of Farm Bureau,* pp. 92-93, 96-97, *infra.* It is therefore misleading to call the appellant a "carrier", "shipper", "manufacturer", etc., in addition to a farmer. Every farmer is a "carrier" or "shipper" in the sense that he transports and hauls his products from the fields to storage, to market, to a processor, or to a carrier for transportation to market. Every farmer also is a "carrier" in the sense that he transports from one part of the farm to another agricultural supplies and agricultural equipment and in the further sense that he sends his trucks to a nearby town and hauls back necessary farm supplies and equipment.

Furthermore, every farmer is a "manufacturer" to the extent to which he transforms the product he grows into marketable condition. Many fruit and vegetable farmers can or pack their own fruits and vegetables;

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[16] The court also stated that appellant has assumed the functions of an operator of village communities. We shall address ourselves in a subsequent part of this brief (*infra,* pp. 57-74) to the question of the applicability of the coverage and exemption provisions of the Act to the appellees engaged in maintaining the dwelling houses located on appellant's plantation and furnishing related domestic services and facilities to the occupants thereof.

many cotton farmers gin their own cotton; and many dairy farmers process their own milk into butter and cheese. All of this is done preparatory to marketing. *Brief of Farm Bureau,* pp. 93, 96-97, *infra.* Such a farmer is as much a farmer within the statute as a farmer who does less. The statute of course does not reduce "farmer" to the lowest common denominator of farming.

The Term "Harvesting" as Applied to the Facts Here Includes the Hauling of Sugar Cane From the Fields to the Mill and the Processing of Such Cane Into Raw Sugar.

As the Supreme Court pointed out in the *Farmers Reservoir* case (337 U.S. at 762), various specific practices are listed in the statute as being included in the primary meaning of the "agriculture" exemption. One of the practices so specifically listed is "harvesting of . . . agricultural . . . commodities". "Harvesting" is defined as "to gather in a crop"[17] or "to gather and store a crop".[18]

The agreed facts show that:

> "Sugar cane is highly perishable, as will be hereinafter described, and starts to deteriorate immediately after harvesting. To avoid serious losses it must be processed into sugar, syrup or molasses within a few hours after it has been burned or severed from the ground. For this reason and because of the great weight and bulkiness of cane as compared with raw sugar, it must be processed within a few miles of where it is grown. Sugar cane never moves into interstate commerce in its natural state." (R. 33).

In view of these facts, we submit that the appellees' activities of hauling perishable sugar cane from the fields to the mill on appellant's narrow gauge railroad—

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[17] Webster's New International Dictionary, Unabridged Version, 2d Ed. 1945, p. 1142.

[18] Standard Dictionary, Funk and Wagnall, 1935 Ed.

all on the farm—were merely part of the gathering in of sugar crops. This Court itself drew an analogy between the hauling of the cane and processing it into a non-perishable product and threshing operations performed on wheat:

> "The gathering of the cane and transporting it on the farm and reducing it to a product which can be handled without loss probably bears some analogies to other farming. In the old days of threshing operations in wheat with stationary threshers, the header cut the grain and it was carried by elevators into header boxes and by the header boxes carried to stacks. Thereafter the stationary thresher would move from one stack to the other and thresh out the grain and place it in sacks. If the farmer owned his own outfit and farmed his own land, it was all a part of the harvesting operation up to the point where the grain was in the bag" 178 F. (2d) at 610.

It is irrelevant, as this Court recognized, that the hauling of cane to the mill took place by railroad rather than by truck or some other medium. *Supra,* p. 20.

The district court denied that these hauling activities constituted "harvesting" on the ground that the gathering of the crop is completed in the fields where it is grown after it is loaded onto rail cars. 97 F. Supp. at p. 222. But this is as absurd as to assert that the cutting of stock feed in the fields completes the gathering in of such stock feed, even though it is then taken to storage in a silo on the farm.

No reason exists for drawing any distinction between that part of the hauling operation which takes place on the portable tracks which the district court held exempt (97 F. Supp. at 220; R. 194) and that part which takes place on the permanent tracks. Both are a part of the gathering in of the sugar crops. The portable tracks were used in the fields instead of the permanent tracks only because permanent tracks cannot be laid on account of the interference which would otherwise result in planting and cultivating operations (R. 60). During the

short periods when portable tracks were in use in the fields, they were an integral part of the railroad system over which cane cars moved directly from the fields to the mill (R. 60).

As we shall show below, *infra* pp. 32-33, the agriculture exemption specifically includes "preparation for market, delivery to storage or to market or to carriers for transportation for market". Such language clearly establishes that the terminal point of the agriculture exemption is not reached at least until the farmer has disposed of possession of his product. And if Congress intended the exemption to extend to the delivery of the product to market or to carriers as it expressly provided, obviously it intended that all operations which preceded such delivery should be exempt when performed by the farmer or on the farm as an indispensable incident to or in conjunction with the farming operations. Thus, if transportation required in the delivery of raw sugar to carriers for transportation to market was exempt, it would be meaningless to hold that transportation of cane to the mill (R. 205-206), which preceded even the preparation for market, was not exempt.[19]

The term "harvesting", we submit, likewise included the processing by appellees of the sugar cane grown by appellant. This Court so suggested in its earlier opinion herein:

> "If it be that, to prevent deterioration, there must be direct and immediate delivery from the harvest field to the cane-cleaning plant for cleaning preparatory to crushing, the hauling might be placed upon the same basis as the other processes which are necessary to prepare agricultural products to prevent deteriora-

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[19] For the same reason it would be equally meaningless to hold non-exempt the hauling of supplies and laborers to or from the fields (R. 235-239, 248-256, 279-283) and the repair and maintenance of field implements (R. 191-204) and hauling equipment (R. 198-201, 206-212) necessary to the continued functioning of the field operations and of the operations involved in delivering the cane to the mill.

tion. Again, the threshing operation with wheat, which is only a first step, may furnish a guide. Everyone realizes that, in order to be used, the wheat must necessarily be elsewhere milled into flour. Likewise, everyone realizes that, before the sugar is usable, it must be refined at another factory. *The process of harvesting cane might end only with thhe bagging of the raw sugar, as the harvesting of wheat ends with the bagging of the grain*" 178 F. (2d) at 611. [Emphasis Supplied].[20]

2. *"And Any Practices . . . Performed by a Farmer or on a Farm as an Incident to or in Conjunction with Such Farming Operations, Including Preparation for Market, Delivery to Storage or to Market or to Carriers for Transportation to Market."*

We turn next to the second distinct meaning of the agriculture definition in Section 3(f). After exempting "farming in all its branches" the exemption goes on to include "and any practices . . . performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market". For the reasons which follow this part of the definition of "agriculture" also exempted the activities of appellees now in question.

a. Appellant Was a Farmer.

Appellant was a farmer within the sense used in Section 3(f), since it conducted the farming operations enumerated in Section 3(f) of producing, cultivating, growing, and harvesting sugar cane.

b. Appellees' Activities Now in Question Were Performed on a Farm.

As the Stipulation herein shows, the work of appellees of (a) producing sugar cane, (b) hauling such cane to the

[20] It is material to observe at this point that the processing by a farmer of the sugar cane that he grows is and always has been a normal incident of sugar cane farming in Hawaii (R. 31, 84).

mill, (c) grinding such cane into raw sugar and molasses, (d) repairing and maintaining field implements or hauling and mill equipment, and (e) performing other incidental operations necessary and indispensable thereto, was performed on appellant's plantation, i.e., its farm, except in minor and sporadic instances.[21]

"Farm" is defined in Webster's New International Dictionary (2d ed.), Unabridged, (1945), p. 919 as

> ". . . a piece of land held under lease for cultivation; hence, any tract of land (whether consisting of one or more parcels) devoted to agricultural purposes, generally under the management of a tenant or the owner; any parcel or group of parcels of land cultivated as a unit . . ."

Appellant's plantation meets this definition, for as the agreed facts show (R. 35-36):

> "All the lands devoted to the growing of sugar cane are managed and operated by the Plantation as an integrated farming unit and single enterprise with identical cropping, cultivation and harvesting practices, and with the same labor and equipment. Employees work in the fields moving from one area to another depending upon the program of plowing, planting, irrigating, fertilizing, applying herbicides and insecticides, weeding and harvesting. The cane lands are in various stages of production or preparation. Some acreage is being plowed and furrowed for new planting, some is being "ratooned" (a process hereinafter described), some acreage is in young growth, some in old growth nearing maturity and other acreage is being harvested. The growing, harvesting and processing of the cane and the marketing of the raw sugar constitute one continuous and year around operation . . ."

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[21] For example, in some workweeks appellee Vierra hauled crushed rock from off the plantation to the plantation to be used in making concrete irrigation flumes for use in appellant's irrigation operations (e.g. Stip. pp. 108-110; workweeks Feb. 24-March 2, March 3-9, 10-16, 17-23, 1947). Since this work constituted the going off the farm to obtain supplies and equipment for the plantation, it was clearly exempt under Section 3(f).

The court below, however, stated:

> "Portable track is laid on the *fields* where cane is grown; but the permanent main line transportation is not located on the *farm* in the same sense. True it is located on the plantation property, but the word 'plantation' refers simply to the geographical area of nearly ten thousand acres on which plaintiff conducts all its operations. Obviously cane is not grown on the right-of-way occupied by the fifty-six miles of permanent main line railroad track. Land is set aside exclusively for railroad purpose" [Emphasis Supplied] 97 F. Supp. at 222.

This statement, however, confuses the term "farm" (which may include a number of fields) with the term "field". As we have already shown, the words "on a farm" as used in Section 3(f) mean the land or other place under the ownership or control of the grower, where the growing operation and other operations enumerated in Section 3(f) take place. The term "farm" is not limited to those portions of a farm on which agricultural products actually grow. Thus the permanent rail tracks of appellant's narrow gauge railroad are not located in the cane fields, but they are located on the "farm", just as appellant's field roads are located on the "farm" (R. 64). Thousands of farms throughout the United States have field roads, as they also have barns, silos, wells and many other improvements, on the sites of which agricultural products do not actually grow. The term "farm" has never been used as excluding the locations of such field roads or of such barns, silos, wells and other improvements.

c. Appellees' Activities in Question Constituted Practices Incident to or in Conjunction [22] with the Sugar Cane Farming Conducted by Appellant on its Farm.

All of such activities were integrated and coordinated with and a necessary and indispensable part of appellant's

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[22] The term "incident" is defined in Webster's Dictionary, *supra*, p. 1257, as meaning "appertaining to," "directly and immediately

operations of producing, cultivating, growing and harvesting sugar cane. (R. 35-36, 52, 67, 94; 97 F. Supp. at 204). Moreover, they were performed only upon or with respect to the cane which appellant grew on its own farm (R. 59, 84). Accordingly, such activities were exempt as being practices "incident to or in conjunction with" farming. *Farmers Reservoir Co.* v. *McComb,* 337 U.S. at 766, note 15.

To prevent spoilage and serious loss the cane had to be transported to the mill immediately after being burned or cut and there processed into raw sugar almost at once. (R. 33, 67). The most efficient and profitable operations called for shipment of the raw sugar to mainland refineries immediately upon production (R. 84). The myriad other activities in which appellees engaged, such as the furnishing of water and power used in connection with the growing and milling of cane (R. 45 *et seq.,* 85 *et seq.,* 216-220), were functionally necessary and indispensable for the conduct of the entire operations of appellant. Thus appellees engaged in the activities in question were engaged in practices "incident to or in conjunction with" farming.

The district court denied that these various activities were exempt as being incident to or in conjunction with appellant's operations and relied in part upon the fact that appellees, who engaged in such activities, were carried on appellant's payroll records for accounting and income tax purposes as attached to different departments than the employees who worked in the fields. 97 F. Supp. at 221, 223, 225. But this is irrelevant. The question of whether particular appellees were engaged in practices incident to or in conjunction with appellant's farming operations can be determined only by examining the actual operations of appellant and appellees, and not by examining the manner in which appellant maintained its bookkeeping records.

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pert. to, or involved in, something else". "Conjunction" is defined by Webster, p. 565, as "association," "occurrence together".

d. "Preparation for Market", as Applied to the Facts Here, Means Processing of Sugar Cane Into Raw Sugar.

One of the practices which the agriculture definition specifically exempts, when incident to or in conjunction with the farming operation, is "preparation for market". If the words "preparation for market" are to be given any meaning with respect to sugar cane farming, they plainly embraced the mill operations in which the appellee employees engaged (R. 310-317, 216-220). As already observed, because of the highly perishable nature and weight and bulkiness of sugar cane, it never moves in interstate commerce nor does it have any economic use as such. Rather it must be ground within a few hours after being harvested and therefore within a few miles of where it is grown, before moving in interstate commerce (R. 33). And appellant always processed its sugar cane into raw sugar or molasses before marketing it (R. 31, 33, 67). Clearly then the mill operation was "preparation [of sugar cane] for market". The statutory language likewise encompassed the necessary and incidental function of keeping the mill equipment in good repair (e.g. R. 310-317, 212-220, 223-226). See also R. 94.

The district court, however, held that the appellees engaged in the mill operation of appellant were not engaged in an operation which was a "subordinate" part of farming and therefore their work was not "incident" to appellant's farming operations and did not fall within the agriculture exemption. 97 F. Supp. 223. But the record shows that in terms of effort as represented by hours of labor and in terms of expense as represented by operating charges, appellant's mill operations were clearly subordinate to its cultivating, irrigation, harvesting, and other general field operations (R. 178). Moreover, assuming that appellant's mill operation was not so subordinate and therefore was not "incident" to appellant's "farming" operations, the argument overlooks the fact that the statutory definition of "agriculture" not only

embraces "practices . . . *incident* to . . . farming operations" but, as a separate and distinct category of exempt operations, it also embraces "practices . . . performed by a farmer or on a farm . . . *in conjunction with* . . . farming operations" [Emphasis supplied]. The phrase "in conjunction with" has no connotation of subordinacy. The mill operation was "in conjunction with" the field operations of appellant and as such was within the statutory exemption.

e. "Delivery to Storage or to Market or to Carriers for Transportation to Market".

These incidental and conjunctive practices, which the statute specifically lists, obviously embraced the delivery by appellees of raw sugar to the sugar warehouse for temporary storage and the appellees' sugar shipping activities (R. 317-318).

C. The Legislative History of Sections 13(a)(6) and 3(f) Also Shows That the Work of Appellees in Question Fell Within the Exemption.

Assuming *arguendo* that interpretation of the statutory language is in doubt and requires resort to the legislative history to resolve any ambiguity,[23] that history emphatically underscores appellant's interpretation of the dominant Congressional purpose.

1. *Senate proceedings.* S. 2475,[24] which ultimately became the Fair Labor Standards Act of 1938, was introduced in the Senate on May 24, 1937. As the bill was introduced, agricultural laborers were exempt but there was no definition of the term "agricultural laborer."

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[23] *United States* v. *C.I.O.*, 335 U. S. 106, 112-113; *Addison* v. *Holly Hill Fruit Products*, 322 U. S. 607, 615, 617-618; *U. S. et al.* v. *American Trucking Associations, Inc.*, 310 U. S. 534, 547 *et seq.*

[24] The bill in its various forms—as introduced, as reported, etc.—referred to in this discussion of the legislative history will be found in "Senate Bills, 75th Cong. 1937-38, Vol. 13, 2401-2550—J-50-2d Set."

The Senate Committee on Education and Labor, to which the bill was referred, rewrote the agricultural exemption and defined "agriculture" as including

> ". . . farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, forestry, horticulture, market-gardening, and the cultivation and growing of fruits, vegetables, nuts, nursery products, ferns, flowers, bulbs, livestock, bees, and poultry, and further includes the definition contained in sub-division (g) of section 15 of the Agricultural Marketing Act, approved June 15, 1929, as amended, or any other agricultural or horticultural commodity, and *any practices ordinarily* performed by a farmer as an incident to such farming operations" [Emphasis supplied]. *S. 2475* as reported in the Senate July 6, 1937, Section 2, pp. 50-51.

The report accompanying the bill contained only a brief statement that there was excluded from the bill—

> "persons engaged in agriculture and such processing of agricultural commodities as is ordinarily performed by farmers as an incident of farm operations" (*S. Rep. 884,* 75th Cong., 1st Sess., p. 6).

Senator Black, chairman of the Senate Committee in charge of the bill, in opening the Senate debate on the bill, stated that it—

> *"specifically excludes workers in agriculture of all kinds and of all types. There is contained in the measure, perhaps, the most comprehensive definition of agriculture which has been included in any one legislative proposal"* [Emphasis supplied]. 81 Cong. Rec. 7648.

Appendix C herein, p. 113, *infra,* sets forth additional parts of Senator Black's statement.

In debate, Senator Pope asked if "dairying" would include "the farmer who bottles his own milk and cream and sells it" "even though he might do it in considerable quantity." Senator Black answered, "Unquestionably", and further, "I have no doubt that a dairy farmer who bottles his own milk is still a dairy farmer. The fact that

he bottles it would not change his characteristics from that of a farmer." 81 Cong. Rec. 7656.

Senator Copeland read a telegram from the International Apple Association urging that the agricultural exemption be amended to include "preparing for market, in their raw or natural state within the area of production, fresh fruits and vegetables, including packing, packaging, storing, transporting, and marketing of said commodities" *Id.*, p. 7656. Senator Black commented that the Committee was not in favor of exempting the packing business as it related to many agricultural products. But he significantly added: *"The farmer or the apple grower has a perfect right, of course, to pack his own apples either alone or in cooperation with his farming neighbors . . ."* [Emphasis supplied]. *Id.*, p. 7657.[25]

Senator Overton then asked Senator Black whether if a farmer has a large cotton plantation and gins his own cotton, the ginning operation is exempt. Senator Black said yes, that that would be a process in the agricultural handling of cotton and that the "bill does provide that *those things done with reference to commodities produced on the farm by the farmer on the farm are not included in the possible application of the Act"* [Emphasis supplied]. *Id.*, p. 7657.

Later in the debates, Senator Black, commenting upon a suggestion of Senator Schwellenbach that the line of distinction be made at the point of agricultural operation and that "when it becomes a processing operation, a canning operation, it ceases to be an agricultural operation," stated as follows: "Going into another phase of farming,

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[25] Senator Copeland later questioned Senator Black on the packing by a farmer of his own apples, his placing same in a storage house, and his subsequent transportation of the apples to market. Senator Black stated that such operations would be exempt. He drew an analogy between such operations and those of a farmer raising watermelons who packs his fruit in crates and then takes them to town to sell them either to a broker or from house to house. All such operations, he stated, would be exempt. 81 Cong. Rec. 7658. See also similar statements by Senator Schwellenbach (*Id.*, p. 7659) Appendix C herein, p. 113, *infra.*

let us take the man who raises hogs. *A great many farmers who raise hogs kill their hogs on their own farms . . . They prepare the hogs for market on their own farms, and then send out the product.* As the bill is framed, *there would be no possible manner in which their employees could be included under the provisions of the bill, because that would clearly be farming; . . .*" [Emphasis supplied]. *Id.,* p. 7659.

The debate went further and specifically addressed itself to the processing of sugar cane. Senator Overton inquired whether a sugar plantation with a mill at which it processed its own cane into sugar would be exempt. Senator Black replied that it would depend upon whether such processing was *ordinarily* performed by a farmer upon his crop. *Id.,* pp. 7657-7658. See Appendix C herein, pp. 113-116, *infra.* Since the word "*ordinarily*" was later stricken from the exemption before the bill was enacted, it is obvious that the grinding by a farmer of his own cane was intended to be within the exemption whether or not "ordinarily" a farmer does such grinding. In any event, cane grinding is "ordinarily" performed on its own plantation by the appellant itself on the cane that it grows, following the usual practice in Hawaii. *Supra,* p. 6. See also footnote 20, p. 28, *supra.*

As for exemption of operations and facilities functionally necessary and indispensable to the growing and processing of sugar cane and to the shipment of raw sugar so processed, such as the hauling of cane from the fields to the processing plant and the repair of field, hauling, and processing equipment, this too was not left in any doubt. On July 30, 1937, Senator McGill introduced an amendment (*Id.,* p. 7888) to provide that the agricultural exemption should apply not only to practices ordinarily performed *by a farmer* as an incident to his farming operations, but also to practices performed *on a farm* as an incident to such farming operations. His amendment further provided that following the words "any practices ordinarily performed by a farmer or on a farm as an

incident to such farming operations," there be added the words "including delivery to market."

Senator McGill stated that the purpose of his amendment was to exempt all kinds of work done on a farm so long as it was incidental to agricultural purposes and was merely preparatory to the marketing of the field crop and that the amendment would also include all kinds of labor performed in connection with making delivery to market of agricultural products. *Id.,* pp. 7888, 7927, 7928. The amendment was adopted. *Id.,* p. 7888. The discussion on the McGill amendment and also on a related amendment introduced and then withdrawn by Senator McAdoo appears in Appendix C herein, pp. 116-119, *infra.*

The bill as passed by the Senate on July 31, 1937 defined "agriculture" in relevant part as including

> ". . . any practices *ordinarily performed* by a farmer or *on a farm* as an incident to such farming operations, *including delivery to market*" [Emphasis supplied].

2. *House proceedings.* The bill was thereupon referred to the House Committee on Labor. As reported by such Committee on August 6, 1937 "agriculture", insofar as relevant here, was defined as including

> ". . . *any practices performed by a farmer or on a farm* as an incident to such farming operations, *including delivery to market* . . ." [Emphasis supplied]. *H. Rep. 1452,* 75th Cong., 1st Sess., pp. 4-5.

The bill as reported by the House Committee thus struck "ordinarily" from the definition of agriculture, so that the definition included *any practices* performed by a farmer or on a farm as an incident to farming operations, without qualifications. The Committee report made specific reference to the fact that it had stricken the word "ordinarily", thus showing that such action was not inadvertent. *Id.,* p. 11. And the definition as ultimately enacted did not contain the word "ordinarily" or any similar limitation.

The Rules Committee of the House refused to grant a rule, but on December 13, 1937, that Committee was discharged from further consideration of the bill by petition of the House membership. However, on December 17, 1937, the bill was recommitted to the Labor Committee. At that time, insofar as relevant, "agriculture" was still defined as when the bill was reported on August 6, 1937.

On April 21, 1938, another draft of S. 2475 was reported to the House. As reported the definition of "agriculture" was again broadened, and, insofar as relevant, read as follows:

> "'Agriculture' includes . . . *any practices performed by a farmer or on a farm as an incident to such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market*" [Emphasis supplied]. *H. Rep. 2182,* 75th Cong., 3d. Sess., p. 2.

This definition added the phrases: "preparation for market,[26] delivery to storage . . . or to carriers for transportation to market." The bill passed the House on May 24, 1938 in this form.

3. *Conference Report and debates thereon.* The Conference Report not only retained every single amendment that had broadened the definition of "agriculture," but it made that definition still more inclusive by exempting all practices performed by a farmer or on a farm *"in conjunction with such farming operations."* 83 Cong. Rec. 9253-9254. Thus Congress was even unwilling to restrict the definition to practices that were *incident* to farming operations, but made explicit its intent that the exemption should apply as well to practices *in conjunction with farming operations.*

In Senate debate on the Conference Report, Senator Elbert D. Thomas, who had succeeded Senator Black as

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[26] Unlike similar language in Section 13(a)(10), this is not limited by the requirement that the preparation for market of the agricultural commodities be of the commodities in their raw or natural state. Hence, any preparation for market by the farmer or on a farm is exempt even if in such preparation the raw or natural state of the commodities is changed.

chairman of the Senate Committee on Education and Labor, and was chairman of the Senate conferees, stated that the agricultural exemption was purposely all-inclusive. 83 Cong. Rec. 9162-9163. See Appendix C, herein, p. 119, *infra.*

4. *Conclusion.* The legislative history shows that Congress started with a very broad, comprehensive definition of agriculture, and that such definition at every stage of its consideration by one or the other of the houses of Congress, as the bill worked its way through to passage, was made more and more all-inclusive. Practices "performed . . . on a farm" as an incident to farming operations were added to the original definition, which was intended to include such highly mechanized or industrialized operations as milk bottling, cane sugar grinding, fruit packing, cotton ginning and hog slaughtering, and all without qualification as to whether they were "ordinarily" performed by the farmer or on the farm. Also exempted were "preparation for market," "delivery to . . . market," "delivery to storage," "delivery to . . . carriers for transportation to market," and finally, practices "performed . . . in conjunction with" farming operations.

No distinction was drawn by Congress as between "large" or "small" farms or between "hand labor" or "mechanized" farms. Congress granted a sweeping exemption to *all* "agriculture," regardless of the mechanized character of the operations in order not to impose upon *any* agriculture the costs and other obligations imposed upon industry. Without the broad definition of "agriculture" which was written into the bill, it is a reasonable conclusion from the legislative history that the bill could not have been enacted into law (83 Cong. Rec. 7393, 9257).

D. The Decided Cases Also Show That the Work of the Appellees in Question Was Exempt Under the Agriculture Exemption.

Farmers Reservoir & Irrigation Co. v. *McComb,* 337 U.S. 755, is the only case involving the agriculture exemp-

tion which has been considered by the United States Supreme Court. In that case the Supreme Court held that the employees of a farmers' mutual irrigation company were not within the agriculture exemption. The irrigation company owned four large and several small reservoirs and a system of canals from 200 to 300 miles long. Its sole activity was the collection, storage and distribution of water for irrigation purposes to its own stockholders, all of whom were farmers. However, the irrigation company was not a farmer because it did not grow anything and none of its activities was performed on a farm. The Supreme Court found that such activities, as conducted by a mutual irrigation company, were not farming and also did not constitute practices performed by a farmer or on a farm as an incident to or in conjunction with farming operations.

The opinion in the *Farmers Reservoir* case makes it clear that if irrigation activities are conducted by a farmer, for the benefit of his farm, the employees engaged in such irrigation activities are within the agriculture exemption. 337 U.S. at p. 761-762. The opinion also makes it clear that if transportation and processing activities are conducted by a farmer, with respect only to commodities produced by that farmer, the farmer's employees engaged in such activities are within the agriculture exemption, such activities being incident to or in conjunction with the farming activities of the farmer. 337 U.S. at p. 766, note 15. However, where a farmer transports or processes on his farm the commodities produced by another farmer, such activities are not within the agriculture exemption because they are not performed by the farmer as an incident to or in conjunction with his own farming operations. This matter is important in the instant case, because appellant does not transport or process any sugar cane except that grown by it on its own plantation (R. 59, 84).

The district court, in narrowly delimiting the exemption, placed great reliance upon three decisions of the United States Court of Appeals for the First Circuit, all of which involved sugar operations in Puerto Rico. 97 F.

Supp. at 220-221. Two of these decisions, namely, *Calaf* v. *Gonzalez,* 127 F. (2d) 934, and *Bowie* v. *Gonzalez,* 117 F. (2d) 11, 123 F. (2d) 387, were specifically held by this Court to be inapplicable to the facts here. 178 F. (2d) at 611. This Court ruled that the explanation of the decisions in these two Puerto Rico cases is the same as the explanation of the *Farmers Reservoir* case, and stated:

> "The question as to the classification of workers who have to do with irrigation has recently been dealt with by the Supreme Court of the United States in Farmers Reservoir & Irrigation Co. v. McComb, Adm., 337 U.S. 755, 69 S.Ct. 1274. There it was held that an irrigation system common to a great many farms which hired its own employees was under the provisions of the Fair Labor Standards Act and was not covered under the agricultural exception. But the Court there pointed out that in the particular case there was not an operation by a farmer or on a farm, but that it was a communal enterprise by several farms. The explanation for this case is the same as that of Calaf v. Gonzalez, 1 Cir., 127 F. 2d 934; Bowie v. Gonzalez, 1 Cir., 117 F. 2d 11; Gonzalez v. Bowie, 1 Cir., 123 F. 2d 387, and the opinion of this Court in North Whittier Heights Citrus Ass'n v. National Labor Relations Board, 9 Cir., 109 F. 2d 76." 178 F. (2d) at 611.

It should be noted that at the same time this Court expressed the view that it was the "desire [of Congress] to exempt processing as a part of the harvesting done by a farmer or on a farm". 178 F. (2d) at 609.

The other Puerto Rican sugar case, upon which the district court relied, namely *Vives* v. *Serralles,* 145 F. (2d) 552 (C.C.A. 1), supports appellant's contention. That case dealt with the status under the agriculture exemption of cane transportation employees who worked solely on farms. The employer grew sugar cane on several separate farms. On one of the farms the employer operated a mill where the sugar cane was processed. The employer also owned and operated a railroad which was used in the transportation of sugar cane from the outlying farms

to the mill. The railroad was not used to transport sugar cane grown on the farm where the mill was located. The case involved two groups of employees: (1) employees on the outlying farms who transported the sugar cane, after it was cut, to concentration points where railroad sidings were maintained; (2) employees on the farm where the mill was located, who transported sugar cane, after it was cut, to the mill. The transportation above referred to was in railroad cars pulled by oxen over portable tracks, in ox-carts, or in steel cars pulled by tractors.

The court held that both groups of employees were within the agriculture exemption. The court pointed out that the situs of the activities of both groups of employees was on the farm and that the transportation operations were really part of harvesting. The significance of the holding, to the instant case, has to do with the second group of employees, who worked on the farm where the mill was located and who transported the sugar cane, after it was cut, to the mill on that farm. In this respect their activities were identical with the activities of the sugar cane transportation employees in the instant case. For reasons which have already been given, no distinction can be made based on differences in the types of vehicles used in the transportation or in the extent of mechanization of the transportation operation.

Thus, the proper interpretation of the Puerto Rico sugar cases is that they hold that transportation employees and processing employees are within the agriculture exemption when they are transporting or processing sugar cane grown by their employer, but that they are not within the exemption when they are transporting or processing sugar cane grown by others than their employer. Not only has this Court so interpreted such cases, *supra* p. 41, but the United States Supreme Court and the First Circuit itself have so interpreted them, as will be more fully shown below.

Supreme Court: In *Farmers Reservoir & Irrigation Co.* v. *McComb*, 337 U. S. at 766, note 15, the Supreme Court

referred to the first of the Puerto Rico sugar cases and stated:

> "Although not relevant here, there is the additional requirement that the practices be incidental to 'such' farming. Thus processing, on a farm, of commodities produced by other farmers is incidental to or in conjunction with the farming operation of the other farmers and not incidental to or in conjunction with the farming operation of the farmer on whose premises the processing is done. Such processing is, therefore, not within the definition of agriculture. Bowie v. Gonzalez, 1 Cir., 1941, 117 F. 2d 11."

The inference is plain, that the processing on a farm of commodities produced solely by the farmer comes within the exemption. Furthermore, the reference to the *Bowie* case indicates the intent of the Supreme Court that the rule would apply to the processing of sugar cane. Similarly, if the rule applies to processing it must apply to pre-processing transportation to the mill.

First Circuit: The Court of Appeals for the First Circuit has also held that the decisions in the *Farmers Reservoir* case and the decisions in the Puerto Rico sugar cases reflect the same rule of law. In so doing the court necessarily held that the governing factor in such cases was whether the activities of the employees were solely incidental to or in conjunction with the farming operations of their employer or were incidental to or in conjunction with the farming operations of other farmers. This holding appears in the decision in *Puerto Rico Tobacco Marketing Coop. Association* v. *McComb,* 181 F(2d) 697, wherein it was determined that the employees of a tobacco marketing cooperative association, which engaged in warehouse and fermenting and stemming operations for the benefit of its members, were not within the agriculture exemption. The court stated:

> "The Farmers Reservoir & Irrigation Co. case is squarely in point in all material respects and rules the case at bar so far as §13(a)(6) is concerned. Indeed the language of the Supreme Court in that

> case is directly applicable, *mutatis mutandis,* to the case at bar. See also to the same effect the decisions of this court in Bowie v. Gonzalez, 117 F.2d 11; Calaf v. Gonzalez, 127 F.2d 934; Vives v. Serralles, 145 F.2d 552, and McComb v. Super-A Fertilizer Works, 165 F. 2d 824." 181 F (2d) at 701.[27]

It thus appears that the Supreme Court, this Court, and also the Court of Appeals for the First Circuit itself, have all interpreted the decisions of the latter court in the Puerto Rico sugar cases as being based on the distinction between the performance by a farmer of transportation and processing activities relating to his own products and the performance by him of such activities relating to the products of other farmers.

The district court relied on the decision of this Court in *North Whittier Heights Citrus Association* v. *N.L.R.B.,* 109 F. (2d) 76, which involved the employees of a cooperative processing and marketing association. 97 F. Supp. at 223. This Court, in its prior decision in the instant case, however, rejected the rationale of the *North Whittier Heights Citrus Association* case as having any application here because it was similar to the rationale of the *Farmers Reservoir* case and of the Puerto Rico sugar cases. 178 F. (2d) at 611.

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[27] The district court for the District of Puerto Rico has interpreted the decisions of the First Circuit in the same way. This appears from the fact that in *Bruno* v. *Hills Brothers Co.,* 7 Labor Cases, paragraph 61763 (D. Puerto Rico 1943), decided after the decisions in the *Bowie* and *Calaf* cases, the district court of Puerto Rico held that employees engaged in canning and packing grapefruit and curing citron raised by their employer on its farms were within the agriculture exemption.

II. THE APPELLEES WERE ALSO EXEMPT FROM THE OVERTIME PROVISIONS OF THE ACT UNDER SECTION 7(c) WHEN THEY WERE ENGAGED IN ANY OF THE FOLLOWING DURING THE PERIOD COVERED BY THE LITIGATION:

(a) HAULING OF SUGAR CANE PRODUCED BY APPELLANT FROM THE FIELDS TO THE MILL AND REPAIRING, MAINTAINING, AND SERVICING EQUIPMENT AND FACILITIES USED IN SUCH HAULING;

(b) GRINDING SUCH SUGAR CANE AT THE MILL INTO RAW SUGAR AND MOLASSES, AND REPAIRING, MAINTAINING, AND SERVICING THE MILL AND ITS EQUIPMENT;

(c) TEMPORARILY STORING, LOADING, AND SHIPPING SUCH RAW SUGAR AND MOLASSES, AND

(d) SUCH OTHER INCIDENTAL OPERATIONS AS WERE NECESSARY AND INDISPENSABLE TO THE FOREGOING.

The district court confined the Section 7(c) processing exemption to those appellees who worked in the mill building, and who were (a) operating machinery which processed sugar cane into raw sugar or (b) bagging, loading and shipping such raw sugar. (R. 310-318; 97 F. Supp. at 222-223.)

We submit that the district court's holding as to Section 7(c) is erroneous and that in fact appellees were exempt under that section when engaged in any of the activities listed in the heading above. This is a material contention only if the Court should be of the view that the Section 13(a)(6) exemption did not apply to exempt all the appellees when they were engaged in such activities, as we have contended in Part I of our Argument. In that case we submit that the appellees not found exempt from overtime requirements under Section 13(a)

(6) were necessarily exempt under Section 7(c). As this Court pointed out in its earlier decision herein:

> "As to sugar, the *all-year processing* exclusion, in addition to the broad *agricultural* exclusion, indicates strongly congressional intent. *Not only was it the desire to exempt processing as a part of the harvesting done by a farmer or on a farm, but also processing done by a third party.* These provisions are not alternative or mutually exclusive, and should be liberally construed for the reasons given by this Court in *McComb* v. *Hunt Foods, Inc.,* 9 Cir., 167 F. 2d 905, 908" [Emphasis Supplied]. 178 F. (2d) at 609.

The district court, we submit, gave the Section 7(c) exemption a hyper-technical and formalistic construction, contrary to the holding of this Court in *McComb* v. *Hunt Foods,* 167 F. (2d) 905, 906. As stated in that case the purpose of Section 7(c) was to relieve certain processors of seasonal or perishable agricultural commodities from the burden of paying overtime. *Id.* pp. 906-907. But under the holding of the district court herein, appellant—a processor of a perishable agricultural commodity—would not be so relieved, because exemption under Section 7(c) would be denied many appellees engaged in activities necessary and indispensable to appellant's sugar cane processing operations.

A. The Language of Section 7(c) Exempted the Appellees When They Were Engaged in Any of the Activities in Question.

The language of Section 7(c), insofar as relevant, exempts without limit as to period of time all employees in "any place of employment" where their employer is "engaged . . . in the processing of . . . sugar cane . . . into sugar (but not refined sugar) or into syrup". Thus, to fall within the exemption it is sufficient to show that (a) the *employer* is engaged "in the processing of . . . sugar cane . . . into sugar (but not refined sugar) or into syrup" and that (b) the work of the *employees* takes place in the "place of employment" where their employer

is "engaged . . . in the processing of . . . sugar cane". [Emphasis supplied]. We submit that both factors were present here.

1. *Appellant Was Engaged "in the Processing of . . . Sugar Cane . . . Into Sugar (But Not Refined Sugar) or Into Syrup".*

Appellant was engaged in just two things: (a) producing sugar cane and (b) processing same into raw sugar and molasses.[28] Insofar as appellees engaged in the activities in question are held not to have been engaged in producing sugar cane and hence not exempt under Section 13(a)(6), they must be held to have been engaged in processing cane into raw sugar or in activities necessary and indispensable thereto, and therefore exempt under Section 7(c). This includes appellees engaged in hauling sugar cane from the fields to the mill, repairing the hauling and processing facilities and equipment, or performing incidental operations necessary and indispensable to such hauling, processing or repair work, such as the hauling or storage of supplies, materials and equipment, or laboratory and office work.

The processing activity in which appellees were engaged was not limited to the mere operation of automatic machinery which ground the cane and extracted its juices. "Processing" included the numerous activities which were necessary and indispensable to the processing of the sugar cane, such as the production of steam and power for use in performing the processing operations, the repair and maintenance of the mill and its equipment, the storage of supplies for the mill, laboratory work for the mill, and the hauling of raw materials, i.e., the sugar cane to the mill. When the appellees were engaged in such activities (e.g., R. 85-86, 90, 205-206, 212-220, 223-226, 227-231, 243-248, 266-273, 286-288, 318-319), they were performing work just as indispensable and as much re-

[28] The incidental activities of appellant with respect to its plantation villages are discussed in Part III of our Argument, *infra*, pp. 57-74.

lated to sugar cane processing, as when they watched gauges in the boiling house or otherwise operated the processing machinery (R. 310-317). The employee appellees were engaged in processing, whether keeping the machines in repair at the adjoining machine shop (R. 243-248) or repairing the machines during breakdowns at the mill (R. 95, 96, 101, 102) with the operating staff of appellant standing by waiting for repairs to be completed. All the repair work, wherever and whenever done, was an indispensable requisite to the continued and effective operation of the processsing facilities (R. 94 *et seq.*).

2. *The Appellees Worked in the "Place of Employment Where He [the Appellant] [Was] So Engaged" in the Processing of Sugar Cane.*

The term "place of employment" as used in Section 7(c) has always been held to include the roads and railways over which raw materials are transported to the processing plant and finished products away from it, as well as to include the several separate buildings in which the processing operation and other incidental operations necessary and indispensable thereto are carried on, if in fact the employer conducts such operations in several buildings. See cases and administrative interpretations discussed *infra*, pp. 49-54. The term "place of employment" cannot mean simply a single building, when the operation, of practical necessity, requires more than one building, but it must embrace the entire premises on which are located all the buildings required in the "processing of . . . sugar cane . . . into sugar". If, as the court below held (97 F. Supp. at 222, 225), Congress intended to limit the exemption to those working in the mill building or establishment, it could easily have selected apt words thus to indicate its purpose, as it did in other sections of the statute.[29]

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[29] Compare Section 12 and Section 13(a)(2) of the Act, where Congress used the more limited term "establishment".

Thus, the appellees engaged in hauling sugar cane from the fields to the mill were working in the "place of employment" where the appellant was engaged "in the processing of . . . sugar cane". And similarly the other appellees under consideration, such as those who repaired the hauling and processing facilities, stored the appellant's supplies, or did laboratory or office work, were working in such "place of employment". The buildings in which they worked, including the mill, service shops, storage places for appellant's supplies, and other buildings, were located in a small, compact and contiguous area of the plantation (R. 38, 721, 723), as all repair, laboratory, warehouse and shipping activities of appellant took place within 300 feet of the mill building proper (R. 94 and 723).

B. The Decided Cases Further Show That in Performing the Activities in Question the Appellees Were Exempt Under Section 7(c).

The decided cases recognize that Section 7(c) grants two types of exemptions. One type, e.g., handling, slaughtering and dressing of poultry or livestock, is limited to particular operations in an industry. The second type—and the processing of sugar cane into raw sugar is one of that type—extends to the entire industry.

The cases make it clear that when the particular exemption involved is one that refers to an entire industry, the exemption applies to all operations which are necessary and indispensable to that industry even though performed in several separate buildings. *Heaburg* v. *Independent Oil Mill, Inc.*, 46 F. Supp. 751 (W.D. Tenn. 1942) (exemption for processing cotton seed held to apply to all employees of a cottonseed mill, including watchmen, clerical employees, and employees handling and selling bagging and ties, most of which was used to wrap and bind lint cotton—a by-product of the mill's business—, but some of which was sold to cotton ginners); *Abram* v. *San Joaquin Cotton Oil Co.*, 49 F. Supp. 393 (S.D.

Calif. 1943) (exemption for processing cottonseed held to apply to employees working in several buildings and structures, including a seed storage house, mill, cleaning house, oil tanks, laboratory, and others, and engaged in laboratory work of analyzing crude cottonseed oil, including some oil from other plants, cleaning the oil, loading oil into tank cars, hauling trash, doing general work, janitorial work, and unloading cottonseed received at the mill).

So here the exemption applied to the work of the appellees in hauling cane from the fields to the mill, processing cane into raw sugar and molasses, repairing the hauling and processing facilities and equipment and performing the operations necessary and incidental thereto, notwithstanding some of such work was not performed in the mill building. All such work was necessary and indispensable to the processing by appellant of sugar cane into raw sugar and molasses.[30]

The Puerto Rico cases referred to *supra*, pp. 40-41, held that cane transportation is "incident to milling,"[31]

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[30] Other cases, dealing with various exemptions in Section 7(c), also fully support our contention that the exemption applies to all the operations of appellees in question. See *Byus* v. *Traders Compress Co.*, 59 F. Supp. 18 (W.D. Okla. 1942) (Section 7(c) year around exemption for compressing cotton held applicable to pressers, truck drivers, and handy-men); *Walling* v. *McCracken County Peach Growers Ass'n.*, 50 F. Supp. 900 (W.D. Ky. 1943) (Section 7(c) exemption for fruit packing industry held applicable to all employees of a fruit packing cooperative, including those who placed lids on the baskets in which the fruit was packed, those who labeled and stamped the baskets, clerical and supervisory employees, timekeepers, mechanics and watchmen); *McDaniel* v. *Clavin* (Calif. App. Ct.), 128 P. (2d) 821, aff'd, 22 Calif. (2d) 61, 136 P. (2d) 559 (1943) (Section 7(c) 14 workweeks exemption per year for handling, slaughtering and dressing poultry held applicable to an employee picking up poultry at warehouses and delivering same to defendant's poultry plant, making deliveries to defendant's customers, opening cases of frozen poultry, dressing poultry, cleaning the premises, etc.).

[31] These cases also held that employees engaged in the transportation by a farmer of his own sugar cane to his mill are within the agriculture exemption, *supra* pp. 40 *et seq.*

and in those cases it was assumed that such transportation was exempt under Section 7(c). See *Calaf* v. *Gonzalez,* 127 F. (2d) 934, 936-937 (C.C.A. 1). These cases involved transportation employees who did no work at the mill. In *Bowie* v. *Gonzales,* 117 F. (2d) 11, such employees included those engaged in repairing and maintaining the transportation facilities. And in *Calaf* v. *Gonzalez,* 127 F. (2d) 934, the employees who were held to be engaged in work "incident to milling" included those who did the following types of work: construction and repair of rolling stock, fireman, locomotive brakeman, splitting wood for engines, repairing main railroad line, signalling at grade crossings, and repairing railroad carts. If Puerto Rico employees engaged in such work were exempt under Section 7(c), so were the cane transportation employees in the instant case (R. 205-212).[32]

In denying exemption under Section 7(c) to appellees engaged in repair work, the district court cited cases (97 F. Supp. at 226), in most of which the employer involved was performing not only the operations described in the exemption language of Section 7(c), but also other operations not so described. For example, in *Walling* v. *Bridgeman-Russell,* (D. Minn. 1942) 6 Labor Cases ¶ 61,422, the employer at his place of business not only was engaged in the first processing of milk and cream into dairy products, but he was also wholesaling eggs, fountain supplies, frosted foods, meats and other commodities and he was making ice cream mix and ice cream. Furthermore, he was cutting, printing and packaging butter made in other places of employment. In *Fleming* v. *Swift,* 41 F. Supp. 825 (N.D. Ill. 1941) the employer not only was handling, slaughtering and dressing livestock, but he was also engaged in meat-curing, sausage-making, and manufacture of dog food, soap, glue and industrial

[32] The denial by the district court of the processing exemption as to these employees was despite the fact that in denying the agriculture exemption to the same employees, the district court cited the holdings in the Puerto Rico cases that cane transportation is incident to milling.

oils. Accordingly, the exemption in those cases was limited to those departments of the employer's business engaged in the operations described in Section 7(c).[33]

In the case at bar, however, aside from the growing of cane, the appellant is engaged exclusively in an operation which 7(c) exempts, namely the processing of sugar cane into raw sugar. The Administrator also has recognized that this distinction exists in the Section 7(c) exemptions and that under the circumstances where an employer is engaged exclusively in an operation which 7(c) exempts, the exemption applies to all activities functionally necessary and indispensable to the exempt operation. See opinion of Administrator set forth in *Appendix* D, p. 120, *infra,* and also pp. 121-122, *infra.*[34]

C. The Administrative Interpretations of Section 7(c) Also Show That in Performing the Activities in Question the Appellees Were Exempt Under Section 7(c).

The Administrator stated in Interpretative Bulletin No. 14 (3 CCH Labor Law Reporter, ¶24,488) that Section 7(c) grants a "complete" exemption from the overtime provisions of the Act to employees "in any place

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[33] *Walling* v. *DeSoto Creamery & Produce,* 51 F. Supp. 938 (D. Minn. 1943) and *Shain* v. *Armour,* 50 F. Supp., 907 (W.D. Ky. 1943), also cited by the district court, are similar, although it should be noted that in the latter case, which involved both the Section 7(c) dairy products exemption and the Section 7(c) exemption for handling, slaughtering and dressing poultry, the dairy products exemption was held applicable to employees transporting cream to the plant. 50 F. Supp. at 913.

[34] The district court also cited *McComb* v. *Del Valle,* 80 F. Supp., 945 (D. Puerto Rico 1948) in support of its position that the Section 7(c) exemption did not apply to appellees engaged in repair work. 97 F. Supp. at 226. But that case did not involve any repair employees but involved only employees engaged in the storage, loading, and shipment of raw sugar and molasses—operations which the court below held exempt under Section 7(c). 97 F. Supp. at 222, 223; R. 317-318. And since in the *Del Valle* case the Section 7(c) exemption was held to apply to employees storing raw sugar in warehouses located as far as 400 feet from the mill building proper, it shows that exemption is not defeated for appellees doing repair work even though they worked in structures located up to 300 feet from the mill building.

of employment'' where their employer is engaged in the processing of sugar cane into raw sugar. ¶¶ 14, 18.

Paragraph 22 of the Bulletin pointed out that the various exemptions provided by Section 7(c) are inapplicable to employees outside the ''place of employment,'' but in this connection the Administrator stated that a '''place of employment', although constituting only one establishment, *may contain several buildings in which the exempt operations are performed*'' [Emphasis supplied]. Par. 22 further stated that ''. . . truck drivers who carry raw materials to the establishment or who transport goods upon which the exempt operation has been performed may be considered as working in the 'place of employment' . . .''

Paragraphs 18 and 22 of the Bulletin are set forth in relevant part in Appendix D herein, pp. 120-121, *infra*.

The Administrator has repeatedly recognized that the Section 7(c) exemptions apply to employees engaged in transporting raw materials to the plant and finished products away from it. Necessarily then he has held such employees to be working in the ''place of employment,'' and he has so declared with respect to employees of a sugar mill. WHM 35:769. The Administrator has gone further and declared that the handling, labeling and casing operations in a cannery storage place may be considered as performed in the same place of employment as the canning operation if (a) the storage place where such operations are performed is *in the same county* as the cannery building or *in a contiguous county,* (b) the canned fresh fruits or vegetables are taken directly to the storage place from the cannery building without intermediate storage at any other place, and (c) the operations are performed by employees of the canner who work interchangeably at the cannery and storage place or whose performance of the work is directed from the cannery in the same manner as if they performed it in a storage place located within the cannery. WHM 35:555. The Wage-Hour Division has also ruled that the removal of beet pulp residue from a sugar beet mill was a necessary incident to the production of sugar and hence within

the Section 7(c) exemption for the processing of sugar beets into sugar or syrup. WHM 35:771.

A fortiori, the various appellees here involved, including those engaged in burning cane residue, i.e. bagasse, as fuel for the production of power for use in performing the various processing operations, came squarely within the categories of employees whom Section 7(c) exempts. They either actually performed the sugar cane processing operation or their occupations were a necessary incident to the cane processing operation. All of them worked under the direction of the plantation manager (R. 37-38) on premises devoted by the appellant to the cane processing operation.

Appendix D herein, pp. 121-123, *infra,* sets forth more extensively a number of other interpretations of the Administrator in conformity with the above.

D. The Exemption Provided in Section 7(c) Was Not Lost When the Appellees Performed Repair and Reconditioning Work on the Mill and Its Equipment During the Off-Season.

The undisputed facts, agreed to by the parties, show that because of the slight variation in climatic and weather conditions from month to month, *sugar cane is grown the year around in the Territory and can be harvested and milled any month in the year—and frequently is.* Solely for efficiency of operations, sugar mills of the Territory must be closed down annually for extensive and general repair and reconditioning because of the heavy wear and tear on mill machinery and equipment. That part of the year when the mill is shut down for repairs is termed the "off-season". (R. 109-110). If these repairs were not done annually, operating shutdowns would be frequent and excessive losses would be incurred. (R. 112). The appellant's off-season averages three months per year (R. 111), but during the period covered by this litigation it ran only some seven weeks. 97 F. Supp. at 208. During the off-season there are no harvesting, ratooning, cane transportation or cane proc-

essing operations. All field operations other than harvesting, ratooning and cane transportation continue throughout the year (R. 111). Most of the off-season repair work is done by the men who operate the mill during the grinding season (R. 112).

We submit that, contrary to the holding of the court below (97 F. Supp. at 224-225), the Section 7(c) exemption must be regarded as applicable to repair work and all other work incidental and functionally necessary and indispensable to the processing of sugar cane into raw sugar, the year around and not only during the grinding season.

The literal language of the Section 7(c) exemption shows that it was intended to apply the year around and not only during the period of the year when the mill is operating. Unlike many other exemptions granted by Section 7(c), which are seasonal exemptions limited to fourteen workweeks in a calendar year, the exemption granted the processing of sugar cane is a year-around one without limitation. This Court emphasized this fact in referring to this exemption as an "all-year processing exclusion". 178 F. (2d) at 609. And the appellant operated its mill the year-round except insofar as such operations were required to be shut for annual repairs (R. 35-36, 52, 109-110, 111).[35] In fact, Hawaii is the only place in the United States which has year-around sugar production. In all other places the operating season is only 5 or 6 months per year.[36] It must be assumed, therefore, that Congress had Hawaii in mind when it granted a year-around exemption in Section 7(c) to sugar cane processing. And since Congress did not limit the ex-

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[35] The court below found that the purpose of the off-season operation was to preserve and enhance appellant's capital investment (97 F. Supp. at 224), but this finding is completely at variance with the stipulated facts which show plainly that appellant's off-season repair work was designed simply to insure the efficient operation of the mill (R. 109 *et seq.*)

[36] *Bowie* v. *Gonzalez*, 117 F. (2d) 11, 14 (Puerto Rico); WHM 40:151-152 (Louisiana); WHM 40:159-160 (Florida); WHM 40:131 (beet sugar industry).

emption to the period of the year when the mill is in operation, the exemption should not be construed as so limited.

Furthermore, Section 7(c) grants exemption to an employer with respect to his employees "in any place of employment" where the employer is engaged in processing sugar cane into sugar or syrup. So long as the "place of employment" is one where the employer processes sugar cane into raw sugar as the appellant did here, the exemption applies. There is no basis for disqualifying off-season work, which also takes place in the prescribed "place of employment" and which is required to permit the mill to continue operating.[37]

A controversy exists with respect to this issue, notwithstanding that appellant paid overtime after 40 hours of work in a workweek during the off-season to appellees working in the mill and also to certain repair shop appellees (R. 37). A declaratory judgment suit will lie to resolve this controversy. *Sunshine Mining Co.* v. *Carver,* 34 F. Supp. 274 (D. Idaho 1940).

Finally, the position of the district court cannot be reconciled with its holding that the exemption is applicable to appellees when they did repair work on the mill and its equipment during the week-end shutdown of the mill. 97 F. Supp. at 223-224.[38] Contrary to the district

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[37] Clearly distinguishable is *Maisonet* v. *Central Coloso* (D.P.R. 1942), 6 Labor Cases, par. 61,337, relied upon by the court below (97 F. Supp. at 225), where the court held the exemption inapplicable to a sugar processing mill in Puerto Rico during the off-season, in a case where the operating season was only six months long. The operation of sugar mills in Puerto Rico is seasonal (footnote 36, *supra*), the shutdown being caused because sugar cane is grown there for only part of the year. This differs completely from the case in Hawaii, where the grinding season is limited only by the needs of mill maintenance. Furthermore, unlike the situation in the *Maisonet* case, the appellant's mill could not easily spread employment sufficiently during the off-season so as to avoid the necessity of overtime work, because just as many man-days of work were performed daily during the the off-season as during the grinding season (R. 114).

[38] There was a shutdown of the mill each week-end in order to perform cleaning and repair operations (R. 83).

court's finding that this shutdown of processing operations lasted only a few hours—even less than a full working shift of 8 hours (97 F. Supp. at 224)—the Record shows that processing operations were suspended in the cane cleaning plant, crushing plant, and sugar warehouse of the mill for 24 hours (Stip. pp. 310, 343, 423), in the boiling house for 16 hours (Stip. pp. 357, 392, 406), and in the power plant for 8½ to 11½ hours (Stip. p. 451). It was only in the fireroom that operations were suspended for only 5 to 7 hours (Stip. p. 437). If actual processing is not necessary to sustain the Section 7(c) exemption during the week-end shutdown, neither is it necessary to sustain such exemption during the off-season.

III. THE APPELLEES WERE NOT "ENGAGED IN [INTERSTATE] COMMERCE OR IN THE PRODUCTION OF GOODS FOR [INTERSTATE] COMMERCE" WHEN THEY WERE ENGAGED IN ANY OF THE FOLLOWING DURING THE PERIOD COVERED BY THE LITIGATION: (A) REPAIRING AND MAINTAINING APPELLANT'S DWELLING HOUSES LOCATED ON THE APPELLANT'S PLANTATION, AND (B) FURNISHING, MAINTAINING, REPAIRING OR SERVICING RELATED DOMESTIC SERVICES OR FACILITIES (FIREWOOD, WATER, ELECTRICITY, BATH HOUSES, SEWAGE DISPOSAL, STREET MAINTENANCE AND CLEANING, PARKS AND PLAYGROUNDS, CLUBHOUSE AND OTHER RECREATIONAL FACILITIES) TO OR FOR THE LESSEES OF SUCH DWELLING HOUSES WHO INCLUDED BOTH EMPLOYEES OF APPELLANT AND OTHERS; BUT ASSUMING THAT THEY WERE "ENGAGED IN [INTERSTATE] COMMERCE OR IN THE PRODUCTION OF GOODS FOR [INTERSTATE] COMMERCE" WHILE PERFORMING SAID WORK, THEY WERE EXEMPT FROM THE OVERTIME PROVISIONS OF THE ACT BY VIRTUE OF SECTION 13(a)(6) OR SECTION 7(C).

The district court held that appellees were engaged in commerce or in the production of goods for commerce when engaged in any of the above activities. 97 F. Supp. at 229 *et seq.;* R. 322. This holding was based upon a series of findings which have no support whatsoever in the Record. All the evidence in the Record bearing upon the issue now being discussed appears in the Stipulation (R. 31, 64, 118-122, 129 *et seq.,* 721, 722; Stip. pp. 744, 759, 768) and in the oral testimony of the appellees (R. 403-614). The material facts revealed by such evidence are set forth below.

A. Facts Concerning Such Housing Maintenance and Services As Shown By Evidence.

At the time the appellant company was organized in 1898, there was no established community having housing or other services or facilities for living in or near the area which it proposed to devote to the production and processing of sugar cane. Consequently, it became necessary for the appellant over a period of years to construct houses, develop services and otherwise establish facilities for permanent living on the plantation *to serve the needs* of the required number of employees and their families (R. 118). The principal plantation community was established around the plantation buildings and yard area and came to be known as the village of Waialua (R. 119, 721).

Waialua village, which is located within the city limits of Honolulu (R. 31), has all the physical and visual characteristics of an established community and is similar to a typical small village or town of a farming community center. The area is criss-crossed with government roads and highways and also roads and highways constructed and maintained by the appellant (R. 121, 722).

After the plantation was established and continued to operate there gradually grew up an independent community now known as the village of Haleiwa, which is

located off the edge of the plantation, a little more than a mile from the village of Waialua (R. 119). Haleiwa is a small business and residential community made up of privately owned residences and typical small retail and service establishments. Haleiwa caters to appellant's employees and to surrounding community residents, who include persons working at other locations on the Island of Oahu, residents of numerous beach houses and Army and Navy personnel using beach recreational facilities. To some extent the village of Haleiwa has become integrated with the village of Waialua with common fire protection equipment and public police patrol officers serving both communities (R. 122).

As previously pointed out, *supra,* p. 8, no employee of appellant, including each and every appellee herein, was required as a condition of employment to live on the plantation or in plantation houses or to use any service or facility which the appellant furnished or rendered its employees. Some employees of the appellant, including some of the appellees (R. 601), lived off the plantation and in houses not owned or supplied by appellant (R. 428-429, 430, 433).

The relationship existing between the appellant and its employees living in plantation houses was that of landlord and tenant: employees paid cash to the appellant for facilities and other services furnished them (R. 119, 120).[39]

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[39] Prior to November, 1946, the employees of appellant who lived in appellant's dwelling houses received such facilities and services as part of their regular compensation. (R. 118, 119). By the collective bargaining agreement, the wage provisions of which were effective on November 19, 1946 (R. 135, 136-137), this perquisite system was abolished, the value of the perquisites previously allowed being converted into cash wages and the employees in turn paying cash for facilities and services furnished them (R. 119, 136-137; Stip. p. 768). There is nothing in the Record to show whether after this conversion the employees paid back to the appellant the same amounts as rental as they had previously been allowed in perquisites or whether they paid a different amount.

B. Unsupported Facts Found by District Court.

The foregoing facts, shown by the evidence, stand in sharp contrast with the completely unsupported facts found by the district court. Thus the district court found that appellant undertook to create a community at its plantation in order to establish a stable labor supply and to house it at places convenient to appellant's purpose (97 F. Supp. at 213, 229, 230); that existing conditions are such that it has been necessary for appellant to furnish housing and community services to its production employees (*Id.* p. 229); that appellant's villages are located both in isolation and insulation from the rest of the Territory and are many miles from any city, (*Id.*); that no other housing in adequate quantity except that provided by appellant is shown to be available to appellant's employees (*Id.*); that appellant's employees have no real choice over whether they will live in an appellant-owned house and that the "possibility of purchasing homes of their own seems to be a remote and rare occurrence . . . only to an inconsequential extent is it possible for employees to rent, at suitable locations near to their places of work, houses owned by anyone other than [appellant]" (*Id.*, pp. 230-231); that under its collective bargaining agreement appellant expressly undertook to provide dwelling maintenance and repairs and village services (*Id.*, pp. 215, 229); that the work of appellees in maintaining and repairing appellant's houses was a material contribution to the appellant's production of sugar, for without such work the houses and village facilities would fall into disrepair, appellant's employees could not occupy them, and there would be marked interference with the continuation of the production of goods for commerce (*Id.*, p. 231); that rental by appellant of its houses to non-employees is negligible (*Id.*, p. 229); and that after the 1946 conversion of housing and facilities into cash values, the employee paid back to the appellant the same amount as rental (*Id.*).

Each of these findings is either unsupported or rebutted by the evidence:

(i) The Stipulation of the parties shows that the reason why appellant constructed houses and developed services and living facilities for its employees was that there was no community with such facilities near the area which appellant proposed to devote to the production and processing of sugar cane (R. 118). There is no evidence whatsoever which would show that the houses and other living facilities were constructed and developed in order to establish a stable labor supply; nor is there any evidence to show that appellant's labor supply has in fact been stabilized by the establishment of the community.

(ii) There is no evidence to support the court's finding that appellant's villages are isolated communities and insulated from the rest of the Territory, miles from any city. The Stipulation of the parties in fact shows the contrary, for it shows that the plantation is within the limits of the City and County of Honolulu (R. 31) and that Waialua village is adjacent to the built-up community of Haleiwa (R. 119, 122, 721). It further shows that there are main highways running through the village area on which employees may easily travel to and from nearby communities (R. 64, 722).

(iii) The finding that the employees have no choice as to whether they will live in a house owned by the appellant is in conflict with the evidence. Appellees' own witness testified that appellant's employees did have a real choice or opportunity to purchase or rent homes in the community not owned or supplied by appellant. (R. 428-429, 430, 433). See also R. 601. Moreover, the Stipulation shows that during the period covered by the litigation, no employee was required as a condition of employment to live in an appellant-owned house (R. 120), and that in fact some employees lived off the plantation in houses not owned or supplied by appellant (R. 121).

(iv) The evidence does not in any way show that the making of dwelling repairs and the maintenance of related domestic facilities were necessary to appellant's produc-

tion operations and that without such work appellant's employees could not occupy the dwelling houses and there would be a marked interference with the production of goods for commerce.

(v) Still, further, the evidence shows that the appellant did not undertake in its collective bargaining agreement to provide dwelling maintenance and repairs and village services (R. 129 *et seq.*)

(vi) The district court's characterization of rental of houses to non-employees as negligible is difficult to take seriously. Of the 3373 persons who lived on the plantation, 421, or 12½%, were lessees and their families who were not employed by the appellant (R. 120-121).

It seems perfectly clear that had the court not made the unsupported findings dealt with above, but instead had found the facts as they actually appear in the record, it would have been unable to hold that the appellees were within the commerce provisions of the Act when engaged in the activities in question.

C. While Making Dwelling Repairs or Maintaining Related Domestic Facilities, the Appellees Were Not "Engaged in [Interstate] Commerce or in the Production of Goods for [Interstate] Commerce" [40].

1. *The Appellees Were Not "Engaged in [Interstate] Commerce" While Performing Such Work.*

The appellees have previously in this litigation conceded that while performing such work they were not engaged in interstate commerce. Furthermore the district court held that the appellees were covered by the Act while performing such work, not because they were

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[40] It should be noted also that, other questions aside, under their counterclaim, the appellees, who were engaged in this work, had the burden of proving that they were "engaged in [interstate] commerce or in the production of goods for [interstate] commerce". In Section 16(b) actions under the Act such burden is upon the claimants. *Warren-Bradshaw Drilling Co.* v. *Hall*, 317 U. S. 88, 90. Appellees have utterly failed to sustain this burden.

engaged in interstate commerce, but because they were engaged in the production of goods for interstate commerce. 97 F. Supp. at 226, 229, 230-232. In any event these appellees were obviously not engaged in interstate commerce while performing such work. See *McLeod* v. *Threlkeld*, 319 U.S. 491, discussed more fully, *infra*, p. 67.

2. *The Appellees Were Not "Engaged . . . in the Production of Goods for [Interstate] Commerce" While Performing Such Work.*

By definition in the Act, applicable during the period involved herein, an employee was deemed engaged in the production of goods if such employee was employed in "producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State" (Sec. 3(j)).

Activities are "necessary to the production" of goods when they bear a "close and immediate tie with the process of production" for interstate commerce, and not simply a "tenuous relation" to such process. See *Kirschbaum* v. *Walling*, 316 U.S. 517, 525. And in applying this standard, the Supreme Court has emphasized that Congress in enacting this statute "plainly indicated its purpose to leave local business to the protection of the States," *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564, 570; *Higgins* v. *Carr Bros. Co.*, 317 U. S. 572, 574,[41] and "did not see fit, as it did in other regulatory measures, e.g., the Interstate Commerce Act . . . and the National Labor Relations Act . . . to exhaust its constitutional power over commerce". *10 East 40th Street Bldg., Inc.*

[41] S. Rep. 884, Committee on Education and Labor, 75th Cong., 1st Sess. p. 5. "The bill carefully excludes from its scope business in the several states that is of a purely local nature. It applies only to the industrial and business activities of the Nation insofar as they utilize the channels of interstate commerce, or seriously and substantially burden or harass such commerce. It leaves to State and local communities their own responsibilities concerning those local service and other business trades that do not substantially influence the stream of interstate commerce."

v. *Callus,* 325 U.S. 578, 579; *McLeod* v. *Threlkeld,* 319 U.S. 491, 493.

a. The Decided Cases Show That the Appellees Were Not Engaged in the Production of Goods for Interstate Commerce While Performing Such Work.

All other cases under the Act involving employees doing work akin to that now in question have excluded such employees from coverage. None has held them covered other than the decision of the court below.[42]

In *Wilson* v. *R. F. C.,* 158 F. (2d) 564 (C.C.A. 5), *cert. den.* 331 U.S. 810, Dow Magnesium Corporation and Dow Chemical Company had built and operated plants for producing magnesium and styrene, respectively. The magnesium and styrene were shipped in interstate commerce. Near the location of the two plants, Defense Plant Corporation acquired a 400 acre tract of land and constructed about 2,000 dwelling houses thereon. Employees of the above two plants were the main occupants of the houses. Plaintiffs worked for Defense Plant as firemen and guards of the 400 acre tract of land and the property thereon, and as operators of the plant furnishing water service to such tract. All such employees were held not covered. While it is true, as the court below pointed out, that the court in the *Wilson Case* said that the independence of the employer of the plaintiffs and the employers of the housing occupants insulated the plaintiffs from the status of producers of goods for commerce, the court went on to stress, *as an additional and separate ground for not covering said plaintiffs,* the fact that their "services *benefited the housing occupants not when they were producing goods for commerce but when they were entirely separated from the production of goods for commerce*" [Emphasis supplied].

In *Coomer* v. *Durham,* 93 F. Supp. 526 (W.D. Va. 1950), plaintiffs were employees of a building contractor

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[42] The district court's earlier decision herein (77 F. Supp. 480) had also held them covered.

engaged under contract with certain interstate coal mining companies to construct, remodel and repair dwelling houses for the purpose of furnishing housing to the coal companies' employees. Such houses were either sold or rented by the coal companies to their employees. The court found that it was not necessary for the coal companies to provide housing for their employees and that the houses involved in the case were not located in isolated communities, but rather such communities were near other communities and were located on state highways linked with the federal highway system, thereby being accessible by auto and bus transportation. The court therefore held that the employees of the building contractor were not engaged in an occupation necessary to the production of goods for commerce and denied recovery to the plaintiffs. The very facts emphasized by the court in that case are present in the case at bar also. There is no evidence to show that it was necessary for appellant to provide housing for its employees. Appellant's dwelling houses were not located in any isolated community but rather in Honolulu itself and there were thriving communities all about, with good highways linking with such other communities and in fact with all of Honolulu, *supra,* p. 61.

Morris v. *Beaumont Mfg. Co.,* 84 F. Supp. 909 (W.D. S.C. 1947), is even closer on the facts. Defendant there operated a textile manufacturing plant where it manufactured cotton textiles for interstate commerce. In addition it owned about 280 residences in the City of Spartansburg, rented primarily to its employees (of about 1100 employees, about 490 occupied the residences). The residences were within a radius of one-half mile of the manufacturing plant and were located on city streets, where they were interspersed with other dwellings not owned by the defendant. Occupancy of the residences was optional with the employees. Plaintiffs were painters or carpenters who in some workweeks were engaged exclusively in constructing, maintaining or repairing the

residences. The court held that the plaintiffs were not engaged in the production of goods for commerce and pointed out that the Wage-Hour Division had ruled that the defendant had complied with the Act. It said that the residences upon which the plaintiffs worked were in no sense devoted to manufacture for commerce and nothing was done therein to promote the production of goods for commerce. None of defendant's business activities was attended to, carried on, or considered in the residences.

The Supreme Court has stated that the problem is essentially one of degree as to the number of "steps removed from the physical process of the production of goods" for interstate movement. *10 East 40th Street Bldg., Inc.* v. *Callus*, 325 U.S. 578, 583.

The following factors placed the appellees beyond the scope of the Act.

First, they worked on homes the occupancy of which was optional with the production employees, including each employee appellee herein (R. 120). The employes could live anywhere they chose, whether on or off the plantation. There were other nearby communities where they could live. The district court's findings to the contrary, as we have shown, are in conflict with the evidence.

Second, there is no evidence to show that the making of dwelling repairs and the maintenance of related domestic facilities were necessary to appellant's production operations, or that such operations were any more efficient because the employees did live on the plantation, or that those employees living off the plantation were any less efficient than those living on the plantation.

Third, the appellees were employed on houses, facilities and services which were not themselves produced for or shipped in interstate commerce, nor were they used in or devoted to the production of goods for interstate commerce. They merely "serve[d] the needs" of the employees, as the parties stipulated (R. 118), when their occupants were *not* engaged in such production at all, but

where wholly separated therefrom in space and function. Such services were as remote from production for commerce as if provided in a village not owned by the appellant.

b. The Cases Relied Upon by the District Court Are Inapposite.

(1) *Cookhouses Cases.*

The district court relied in large part for its conclusion that the work here in question was covered by the Act upon the opinion of this Court in *Consolidated Timber Company* v. *Womack,* 132 F. (2d) 101, in which this Court held the Act applicable to the employees of a cookhouse operated by an employer engaged in logging operations. The decision of this Court in the *Womack* case was in turn based on the decision of the Supreme Court in *Philadelphia, B. & W. R. Co.* v. *Smith,* 250 U.S. 101, in which the Supreme Court held that a cook, employed by a railroad on a camp car used for feeding and housing railroad bridge carpenters, was engaged in interstate commerce within the meaning of the Federal Employers' Liability Act. In the decision in the *Womack* case this Court quoted from the Supreme Court decision and stated: "The reasoning used by the Supreme Court in solving the problem in the above case is applicable to the case at bar." 132 F. (2d) at 105.

However, six months after the decision of this Court in the *Womack* case the Supreme Court ruled that its decision in the *Smith* case "should not govern our conclusions under the Fair Labor Standards Act". This ruling was made in *McLeod* v. *Threlkeld,* 319 U.S. 491 at 496. In that case the Supreme Court held that a cook engaged in furnishing meals to maintenance-right-of-way employees of a railroad were not engaged in interstate commerce within the meaning of the Fair Labor Standards Act. The employees worked for a partnership which was under contract with the railroad to furnish the meals. The Supreme Court indicated that whether the meals

were furnished by the railroad itself or by a contractor with the railroad was not significant. The opinion contains the following:

> "It is not important whether the employer, in this case the contractor, is engaged in interstate commerce. It is the work of the employee which is decisive. Here the employee supplies the personal needs of the maintenance-of-way men. Food is consumed apart from their work. The furnishing of board seems to us as removed from commerce, in this instance, as in the cases where the employees supply themselves. In one instance the food would be as necessary for the continuance of their work as in the other." 317 U.S. at 497.

The issue in the *Threlkeld* case had to do with whether the cook was engaged *in interstate commerce* because serving food to others so engaged. The reasoning of the Supreme Court would be equally applicable to a case involving the issue of whether a cook is engaged in the *production of goods for interstate commerce* because serving food to others so engaged. In either case the persons served need food, whether it is supplied by themselves or by their employer. It appears therefore that the basis of the decision in the *Womack* case has been removed, and that the district court erred in relying on that decision.

Furthermore the *Womack* case is not applicable to the instant case, for reasons stated below.

In the decision in the *Womack* case, this Court, in applying the reasoning of the *Smith* case, stated that the cookhouse employees were sustaining the loggers by keeping their board close to their place of work, thus rendering it easier for the employer "to maintain a proper organization of its loggers and forwarding their work by furnishing the food whereby the men were given the strength to pursue their labors." 132 F. (2d) at 105-106. On the other hand there is nothing in the Record to show in the instant case that without the housing and related domestic facilities the appellant's operations would have

been hampered in any way, or that the furnishing of such housing and related facilities did in fact assist the appellant in maintaining a proper organization of its employees or forwarded their work.

In the *Womack* case some of the meals furnished to employees were necessarily furnished during periods falling between the commencement and ending of the day's work. In this respect the facts in the *Womack* case are similar to the facts in the *cafeteria* cases, discussed below. On the other hand the employees in the instant case who made dwelling repairs and maintained related domestic facilities "serve[d] the needs" of the production employees (R. 118) only when the latter were completely separated in space and function from the production of goods for interstate commerce.

Still further, the Court in the *Womack* case emphasized that the cookhouse was not operated to show a profit and that the service there was sold at cost, 132 F. (2d) 101 at 103, 107. In the instant case, however, the appellant, while it agreed not to make housing a profit-making venture as such, did make a profit out of such housing, for in the collective bargaining contract fixing the rental rates, the appellant was allowed a return on its invested capital (R. 175).[43]

(2) *Cafeteria Cases*

The court below also relied upon cases holding covered employees working in a cafeteria or canteen located in a plant producing goods for commerce and serving the employees working in such plant. *Ferguson* v. *Prophet* (S.D.

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[43] *Hanson* v. *Lagerstrom*, 133 F. (2d) 120 (C.C.A. 8), another cookhouse case relied on by the district court (97 F. Supp. at 227), was based on the decision in the *Womack* case. It also was decided prior to the decision of the Supreme Court in the *Threlkeld* case. *Walling* v. *Armstrong Co.*, 68 F. Supp. 870 (D. Mass. 1946), also relied on by the district court (97 F. Supp. at 228), dealt with the status of employees who engaged in the production of food and other items which were actually transported in interstate commerce.

Ind. 1946) 11 Labor Cases, ¶ 63297; *McComb* v. *Factory Stores,* 81 F. Supp. 403 (N.D. Ohio 1948); and *Basik* v. *General Motors,* 311 Mich. 705, 19 N.W. (2d) 142 (1945). Holding to the contrary under these circumstances are *Kuhn* v. *Canteen Food Service,* 77 F. Supp. 585 (N.D. Ill. 1944), appeal dismissed 150 F. (2d) 55 (C.C.A. 7); *Bayer* v. *Courtemanche,* 76 F. Supp. 193 (D. Conn. 1947); and *Tipton* v. *Sprott,* 93 F. Supp. 496 (S.D. Calif. 1950).[44]

Aside from the fact that the cafeteria cases are in conflict with each other and that those which were relied on by the district court are in conflict with the reasoning of the Supreme Court in the *Threlkeld* case, they are readily distinguishable on their facts from the case here. In the cafeteria cases relied on by the district court, the courts found that the production efficiency of the employees was increased and a higher production level was maintained through the operation of the cafeterias and canteens. See, for example, *Basik* v. *General Motors Corp.,* 311 Mich. 705 at 708. In the case at bar, however, there is nothing in the evidence from which it may be inferred that the appellant's plantation operations were any more efficient because the employees lived on the plantation.

Moreover, while it is well recognized, as shown by the *Basik* case, that the serving of hot lunches to industrial employees increases their efficiency, it has never been shown that labor efficiency is increased by having employees reside in dwellings near their place of employment.[45]

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[44] The court below attempted to distinguish the cafeteria decisions holding to the contrary on the ground that the cafeteria in such cases was not operated by the producing plant itself but by an independent concern. But in the *Prophet* and *Factory Store* cases, where the courts held the cafeteria employees covered, the cafeteria was also operated by an independent concern.

[45] The district court recognized herein, 97 F. Supp. at 228-229, that in those cases where the cafeteria employees were held not covered by the Act, the courts emphasized the facts that the producing plant was not in an isolated spot, there were other available

Furthermore, unlike the situation in the cafeteria cases, the employees in the instant case, who made housing repairs and maintained related domestic facilities, "serve[d] the needs" of the production employees (R. 118) only when the latter were completely separated in space and function from the production of goods for commerce. In the cafeteria cases the cafeteria employees worked right in the plant where goods were produced for commerce. Here, the appellees worked at the homes of the employees who *elsewhere* produced goods for commerce and who occupied these homes when they were *not* engaged in production.

The work performed by appellees in making dwelling repairs and maintaining related domestic facilities is indistinguishable in principle from the essentially local repair activities of plumbers, carpenters, electricians, housepainters and others in local trade in innumerable villages, towns and cities in the United States. The only difference is that here the appellees were employed by the producer of goods for commerce—a difference which is not relevant for, as the U. S. Supreme Court has repeatedly held, the coverage of the Act is based upon the activities and work of the individual employee and not upon the business of his employer. *Kirschbaum* v. *Walling*, 316 U.S. 517, 524; *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564, 571-72; *Mabee* v. *White Plains Publishing Co.*, 327 U.S. 178, 184-185. To bring these appellees within the coverage of the Act is to wipe out entirely the distinction between local and interstate activities and to sweep under the Act those essentially local activities which Congress intended to leave to the protection of the States. *Supra*, p. 63.

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and adequate eating places nearby, many of the plant employees ate outside the plant cafeteria, and the cafeteria represented only a convenience rather than a necessity to the plant employees. These factors, as we have shown, were also present in the case at bar so far as appellant's housing and related domestic facilities were concerned.

c. The Administrator Has Never Taken the Position That Employees Engaged in Such Work Are Engaged in the Production of Goods for Interstate Commerce, and Has Never Enforced the Act in Hawaii With Respect to Such Employees.

The Administrator, in reply to inquiries, has always stated that he was not prepared to express an opinion as to the coverage under the Act of employees repairing and maintaining houses owned by their employer and occupied as residences by other employees who were engaged in the employer's plant in producing goods for commerce (1944-45 WHMan., p. 97). Moreover, when this case was previously before this Court, the Administrator filed a brief *amicus,* in which he repeated that he took no position as to the coverage of employees of appellant while engaged in such work.

Furthermore, although he has maintained an office in Hawaii since the beginning of his enforcement activity under the Act and has conducted frequent inspections on Hawaiian sugar plantations to check on compliance with the Act, he has never enforced the Act with respect to employees engaged in the activities in question. The plantations generally, including appellant's, have always treated such employees as outside the commerce provisions of the Act and the Administrator has never so much as hinted that in doing so they were violating the Act.

D. If the Work of the Appellees Here in Question Were an Engagement in "[Interstate] Commerce or in the Production of Goods for [Interstate] Commerce", the Appellees Performing Such Work Were Exempt From the Overtime Provisions of the Act by Virtue of Section 13(a) (6) or Section 7(c).

If the Court should not agree with us and hold that the work here in question was an engagement in interstate commerce or in the production of goods for interstate commerce, then we submit that such holding would bring

such work within the Section 13(a)(6) or Section 7(c) exemptions.

1. Activities so related to the production, cultivation, harvesting and processing of sugar cane that they are in interstate commerce or necessary for the production of goods for interstate commerce must necessarily be so sufficiently related to such activities as to share in the broad exemption provided for such activities. This is clearly shown by a comparison of the crucial statutory language defining the coverage of the Act on the one hand and the agriculture exemption on the other.

Whether the making of dwelling repairs and the maintenance of related domestic facilities were necessary to the production of goods for commerce was determined by the definition of "produced" contained in Section 3(j). Such definition read:

> "'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any *process or occupation necessary to the production thereof,* in any State" [Emphasis Supplied].

Whether such work came within the agriculture exemption in turn depended upon the definition of agriculture contained in Section 3(f). Such definition read in relevant part:

> "'Agriculture' includes . . . *any practices* (including any forestry or lumbering operations) performed by a farmer or on a farm as an *incident to or in conjunction with such farming operations . . .*" [Emphasis supplied].

For the Court to hold the work in question covered by the Act requires it to hold that such work was *necessary* to the production of appellant's sugar cane and its processing. On the other hand, for such work to come within the agriculture exemption it need only be shown that the

work was carried on by appellant as an *incident to or in conjunction with* appellant's farming operations. This statutory comparison shows that it would be arbitrary and unreasonable to hold that appellant's production and processing of sugar cane were so dependent upon its dwelling repairs and maintenance of related domestic facilities as to make the latter necessary to such production and processing of sugar cane, without at the same time holding that the dwelling repairs and maintenance of related domestic facilities were incident to or in conjunction with the sugar cane production and processing.

2. By the same token, the Section 7(c) exemption is applicable to the appellees when engaged in these activities. The Administrator has said that the Section 7(c) exemption applies not only to those employees processing sugar cane, but also to those employees whose operations are "a necessary incident" to sugar cane processing and who work in those portions of the premises devoted to sugar cane processing. *Infra,* p. 121. If the appellees are deemed necessary to the production of raw sugar for commerce when engaged in dwelling repairs and maintenance of related domestic facilities, likewise their operations were "a necessary incident" to the operation of processing sugar cane.

IV. ANY APPELLEE, WHO IN THE SAME WORKWEEK PERFORMED WORK, SOME OF WHICH WAS EXEMPT UNDER SECTION 13(a)(6) AND THE REMAINDER OF WHICH WAS EXEMPT UNDER SECTION 7(c), OR PERFORMED WORK, SOME OF WHICH WAS NOT AN ENGAGEMENT IN COMMERCE OR IN THE PRODUCTION OF GOODS FOR COMMERCE AND THE REMAINDER OF WHICH WAS EXEMPT UNDER SECTION 13(a)(6) OR SECTION 7(c), WAS EXEMPT FOR THAT WORKWEEK FROM THE OVERTIME PROVISIONS OF THE ACT.

Some of the appellees did work in the same workweeks with respect to the appellant's dwelling houses or related domestic facilities and also with respect to the appellant's

field, hauling or mill equipment. R. 223-231, 235-239, 243-256, 266-273, 277-283. Their work with respect to the dwelling houses and related domestic facilities was not within the coverage provisions of the Act at all (or if it was, was exempt by virtue of Section 13(a)(6) or Section 7(c)), and their work on the field, hauling or mill equipment was exempt under either Section 13(a)(6) or Section 7(c).

In such situation, where in the same workweeks appellees performed both work that was not sufficiently close to commerce or to the production of goods for commerce to be considered covered by the Act at all, and work that was exempt under Section 13(a)(6) or Section 7(c), they were obviously excluded from the overtime provisions of the Act.[46] The Administrator is in accord. WHM 35:768. The rule is the same with respect to an appellee who worked part of the workweek in an activity deemed exempt under Section 13(a)(6) and the remainder in an activity deemed exempt under Section 7(c). 3 CCH Labor Law Reporter, ¶ 24105.27.

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[46] *Fitzgerald* v. *Kroger Grocery*, 45 F. Supp. 812 (D. Kans. 1942) holding exempt from the overtime provisions under Section 13(b)(1) employees who in the same workweeks were engaged in driving trucks in interstate commerce—an activity exempt under Section 13(b)(1)—and other driving which was wholly in intrastate commerce and hence not covered by the Act at all.

The same principle applies to appellees other than those working in the service shops. For example, appellee S. Robello worked in the power plant of the mill (R. 218-220). Power there produced was used in the field and mill operations of the appellant, and appellee Robello was thereby entitled to the Section 13(a)(6) or Section 7(c) exemptions. Power was also distributed in the same workweeks and in fact at the same time to the plantation dwelling houses and to some non-plantation users, but none of such power was used for or in connection with the production of goods for interstate commerce, nor was it used to operate any instrumentality of interstate commerce, nor was it transmitted into interstate commerce (R. 91, 92; 97 F. Supp. at 207). Appellee Robello was thus in the same workweeks doing some work exempt under Section 13(a)(6) or Section 7(c) and other work not covered by the Act at all. As explained in the text, he was therefore excluded from the overtime provisions of the Act during such workweeks.

V. ANY APPELLEE, WHO IN A WORKWEEK PERFORMED WORK WHICH WAS EXEMPT UNDER SECTION 13(a)(6) OR SECTION 7(c), AND DID NOT ENGAGE FOR A SUBSTANTIAL PART OF HIS TIME IN THE SAME WORKWEEK IN AN ACTIVITY WHICH WAS NOT SO EXEMPT, WAS EXEMPT FOR THAT WORKWEEK FROM THE OVERTIME PROVISIONS OF THE ACT.

We have contended above that all the work performed by the appellees during the workweeks covered by the litigation was exempt under either Section 13(a)(6) or Section 7(c).[47] But if this Court is of the view that some of the activities of the appellees were not exempt under Section 13(a)(6) or Section 7(c), it becomes material to ascertain the extent to which an employee may engage in non-exempt work in a workweek without losing the exemption otherwise applicable to him during that workweek.

The court below evidently took the position that an appellee, whose other work in a workweek was exempt under Section 13(a)(6) or Section 7(c), lost the exemption for the entire week if he devoted as much as 10 or 20 minutes in the week to a non-exempt activity. 97 F. Supp. at 232-233. We submit that this ruling is unnecessarily harsh and renders meaningless for all practical purposes the exemptions provided by Section 13(a)(6) and Section 7(c). On most farms there is no such thing as the complete segregation of employees and activities. An employee will perform whatever duties are necessary to the farm's operations. But if the agricultural exemption in the Act is to be narrowly construed so that many activities performed on the farm are to be deemed non-exempt, then under the ruling of the court below the agricultural exemption is of no avail to the farmer. The

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[47] We contend therefore that the district court erred in finding that as a general rule the engagement by appellees in non-exempt activities was substantial. 97 F. Supp. at 232.

court's ruling means that in performing the operations necessary and indispensable to farming, the exemption is lost. And the same result follows with respect to the processing exemption provided by Section 7(c).

We submit, therefore, that Congress intended the exemption to apply to an employee in any workweek in which he does not devote a *substantial part* of his time to an activity not exempt under Section 13(a)(6) or Section 7(c). This rule takes cognizance of the realities of a farmer's or processor's operations. Moreover, it comports with the rules laid down by the Administrator with respect to many other exemption provisions in the Act. In the case of the exemptions for executives, administrative employees, professionals, local retailing capacity employees and outside salesmen; retail establishments;[48] seamen; carriers by air; fishery employees; local newspapers; street and suburban railways and local trolley and motor bus operators; switchboard operators; employees engaged in forestry or lumbering operations; and employees of employers subject to Part I of the Interstate Commerce Act, the Administrator has permitted a tolerance of nonexempt work ranging from 20% to 49.999%. The Administrator has specifically said that these percentages of nonexempt work are insubstantial. The Administrator's rulings concerning these several exemptions are detailed in Appendix E herein, pp. 124-125, *infra.*

The reason for allowing a tolerance of nonexempt work in the case of exemptions is that many employees in

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[48] With respect to the Section 13(a)(2) retail establishment exemption, the Administrator allowed a tolerance of 25% of nonexempt work in a workweek without loss of the exemption. (Administrator's Interpretative Bulletin No. 6, ¶18; 3 CCH Labor Law Reporter ¶24,480). He did this under such exemption prior to its amendment by the Fair Labor Standards Amendments of 1949 (63 Stat. 910) which specifically established a 25% tolerance of nonexempt work for retail establishments. The courts applied the tolerance test in many cases. (*Harris* v. *Hammond,* 145 F. (2d) 333, 334 (C.C.A. 5) *cert. den.* 324 U.S. 859; *Northwestern Hanna Fuel Co.* v. *McComb,* 166 F. (2d) 932, 937-938 (C.C.A. 8); *Brown* v. *Minngas Co.,* 51 F. Supp. 363, 371 (D. Minn. 1943)).

occupations intended by Congress to be exempt under one or another of the exemption provisions perform some duties which do not strictly fall within the literal language of the exemption provisions. A failure to allow some tolerance therefore would result in so widespread a denial of the exemption provisions as to substantially defeat the Congressional intention in enacting them. This reason applies equally to the Sections 13(a)(6) and 7(c) exemptions particularly in view of the breadth that Congress intended to accord such exemptions.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the following parts of the Judgment below should be reversed:

A. Part I, paragraph B, paragraphs C1.b. C2.b, C3.b, C4.b, C5.b, C8 - C11, inclusive, C12.a and c, C13.a and c, C14.a and c, C15.a and c, C16.a and c, C17.a and c, C18.a and c, C19.a and c, C20 - C35, inclusive, C36.b, C37 - C42, inclusive, and paragraph D.

B. All of Part II, paragraphs A, B, C, and D.

Respectfully submitted,

Rufus G. Poole
1625 K St., N. W.
Washington 6, D. C.

Livingston Jenks
Anderson, Wrenn & Jenks
Bank of Hawaii Bldg.
Honolulu 1, T. H.

Milton C. Denbo
1625 K St., N. W.
Washington 6, D. C.

Ernest C. Moore, Jr.
302 Castle & Cooke Building
Honolulu, T. H.

Attorneys for Waialua Agricultural Company, Limited

APPENDIX A

Clearly Erroneous Findings of Fact of District Court

The findings of fact of the district court which are clearly erroneous and which appellant specifies as error are the following:

1. Finding that sugar cane "cannot be stored more than 2 or 3 days without spoiling." 97 F. Supp. at 203.

This finding is clearly erroneous because the evidence shows that to avoid serious losses, sugar cane must be processed into sugar, syrup, or molasses within a few hours after it has been severed from the ground. (R. 33, 67). Nothing in the Record suggests that it can be stored for as many as two to three days without spoiling.

2. Findings that (a) the main line railroad of appellant is used to haul sugar cane from points where cane cars have been "concentrated" to the mill and the point of such concentration is the point where the main line track is joined by the portable track (97 F. Supp. at 205, 222); (b) some appellee employees assemble the appellant's harvested crop at "centralized" points on appellant's main line railroad to commence transportation to the mill (97 F. Supp. at 220); and (c) appellant's cane cars are concentrated upon the appellant's main line railroad, "for transport, through intermediate processing, to the sugar refinery". (97 F. Supp. at 220).

These findings are clearly erroneous because there is no evidence in the Record to show that cane cars were centralized or concentrated on appellant's plantation at any point. Rather the evidence shows that cane cars on appellant's plantation moved directly from the fields to the mill both on portable tracks and main line tracks in one continuous operation. (R. 60, 61-62).

3. Finding that bagasse in appellant's mill serves as an economical source of fuel for the production of power. 97 F. Supp. at 207.

This finding is misleading and therefore clearly erroneous, because it does not add the material fact, shown by the evidence, that the production of such power was required for use in performing the mill's processing operations. (R. 86).

4. Findings that (a) appellant undertook to create a community at its plantation in order to establish a stable labor supply and to house it at places convenient to appellant's purpose (97 F. Supp. at 213); (b) "Historically, [appellant] constructed [its dwelling] houses and established [its] villages for the purpose of supplying necessary dwellings for a stable labor pool which [appellant] desired to be in close proximity to its operations" (97 F. Supp. at 229); and (c) "In origin and history, Waialua village was and remains a mill village, company-owned and company-controlled, in every sense of that term. The same is true of the smaller villages on [appellant's] plantation where its employees occupy company-owned dwellings. All these villages, and all of the buildings, houses, and other facilities existing therein, were created by [appellant] for the purpose of providing housing and community services for a stable supply of labor". (97 F. Supp. at 230).

These findings are clearly erroneous because there is no evidence to support them. The evidence shows only that at the time the appellant company was organized, there was no established community having housing or other services or facilities for living in or near the area which appellant proposed to devote to the production and processing of sugar cane, and therefore appellant constructed houses and developed services and living facilities for its employees and their families. (R. 118).

5. Finding that under its collective bargaining agreement appellant "expressly undertakes to provide dwelling maintenance and repairs, and village services". 97 F. Supp. at 215, 229.

This finding is clearly erroneous because the collective bargaining agreement contained no such undertaking by appellant. (R. 129 *et seq.*)

6. Finding that appellant's activities constituted a number of separate and distinct enterprises which taken together constitute a hybrid type of business, and that in the conduct of such enterprises appellant has assumed a variety of functions, including those of farmer, carrier, manufacturer, shipper, and operator of village communities. 97 F. Supp. at 218, 222.

This finding is clearly erroneous because in conflict with the evidence which shows that appellant was engaged in but one enterprise, namely, the production and processing of sugar cane. (R. 31).

7. Findings that (a) since 1943, during the off-season, overtime has been paid by appellant for hours in excess of 40 per week to all its mill and shop employes (97 F. Supp. at 219); and (b) appellant "has never treated repair shop employees as falling under the agricultural exemption" as is shown by such overtime payment. 97 F. Supp. at 225.

These findings are clearly erroneous because the evidence shows that certain of the repair shop employees did not receive overtime compensation for their hours over 40 in a week during either the grinding season or the off-season (appellees Ezawa (Stip. p. 542-543, 553); Reyher (Stip. pp. 526-527, 538); Mori (Stip. pp. 596-597, 605); Sakai (Stip. pp. 628-629); and Kashiwabara (Stip. pp. 709-710, 722)). Others of the repair shop employees were paid such overtime in one or two weeks of the off-season but in most such weeks were not so paid (appellees Claunan (Stip. pp. 557-558, 569; Yamada (Stip. pp. 589-590, 593); and A. Robello (Stip. pp. 573-574, 585)). The district court itself made findings showing that the repair shop employees mentioned did not generally receive overtime compensation after 40 hours per week dur-

ing the off-season. (R. 221, 232-233, 240-241, 256, 259-260, 264-265, 274-275, 277-278).

8. Finding that the agricultural aspect of appellant's operations terminates "with the concentration of cars loaded with cane, upon the main line railroad operated by [appellant], for transport, through intermediate processing, to the sugar refinery". 97 F. Supp. at 220.

This is a legal conclusion which is clearly erroneous, for the reason that the agriculture exemption in the Act included the hauling of sugar cane produced by appellant from the fields to the mill, the processing of such sugar cane into raw sugar and molasses, the temporary storage, loading and shipment of such raw sugar and molasses, the repair, maintenance and servicing of hauling, processing and field equipment and facilities, and such other incidental operations as were necessary and indispensable to the foregoing.

9. Findings that (a) Appellant's train crews are not engaged in "any act of producing sugar cane, or in any act incidental to or conjoint with the production of sugar cane; nor in processing cane into sugar at the mill, where the processing occurs" (97 F. Supp. at 220); (b) it is immaterial to the determination of the applicability of the Section 13(a)(6) or Section 7(c) exemptions in the Act, that the train crews are employed by the same company which employs the farm hands and the processing crews (97 F. Supp. at 220); (c) "Railroading is not farming or processing, nor intended by the Act to be a part of either" (97 F. Supp. at 221); (d) "The activities of the [appellant's] railroad crew, and of those employed in activities relating to maintenance, upkeep and operation of the main line railroad system, occur subsequently to and independently of the [appellant's] farming activities, albeit coordinated thereto" (97 F. Supp. at 221); and (e) "Hauling cane on the [appellant's] main line railroad is not a part of harvesting operations,

since the gathering of the crop is completed on the fields on which it is grown prior to transportation; and such transportation constitutes neither a storing of such crops, nor transportation either to storage or market". (97 F. Supp. at 222).

These are all clearly erroneous legal conclusions. Appellant's train crews, including those engaged in maintaining and repairing the main line tracks, were engaged in "farming," "harvesting," and in "practices . . . performed by [appellant] or on [appellant's] farm as an incident to or in conjunction with [its] farming operations" within the meaning of the Section 13(a)(6) agriculture exemption in the Act. Furthermore, appellant's train crews also fell within the Section 7(c) processing exemption in the Act. Still further, it *was* material to the application of the Section 13(a)(6) exemption in the Act that appellant's train crews transported only the cane which appellant grew, and it *was* material to the application of the Section 7(c) processing exemption that the train crews were employed by the same employer which employed the processing crews.

10. Finding that appellant has not treated its railroad employees as within the exemption of Section 13(a)(6), for "during off-season these employees have been paid overtime after 40 hours of work". 97 F. Supp. at 221.

This finding is clearly erroneous because in conflict with the evidence, which shows that certain of the railroad employees did not receive overtime during the grinding or off-seasons until after 48 hours of work in a week. (Appellees Sera (Stip. pp. 260-270) and T. Okouchi (Stip. pp. 271-283)). The district court in fact elsewhere so found. (R. 209, 210-211).

11. Findings that (a) appellant distinguishes on its records of operating costs between harvesting and main line transportation (97 F. Supp. at 221); and (b) in the maintenance of its records, appellant separates field

activities from transportation at the point where cane cars are placed on the main line railroad. (97 F. Supp. at 222).

These findings are clearly erroneous and misleading, because the evidence shows that appellant also distinguished on its records of operating costs between harvesting and *field* transportation and on such records separated field activities from transportation at the point where cane cars were placed on *portable tracks in the fields.* (R. 178).

12. Finding that appellant's permanent main line transportation is not located on a farm. 97 F. Supp. at 222.

This finding is clearly erroneous because in conflict with the evidence which shows that such main line transportation *was* located on a farm. (R. 59, 721, 722).

13. Finding that appellant's mill operations are so conducted as to assume the character of a distinct business enterprise of an industrial nature. 97 F. Supp. at 222.

This finding is clearly erroneous because the evidence shows that appellant's mill operations were not a distinct business enterprise but rather constituted either "harvesting" or "practices . . . performed by [appellant] or on [its] farm as an incident to or in conjunction with [its] farming operations, including preparation for market" within the meaning of the Section 13(a)(6) agriculture exemption. Appellant's mill operations were but an integral and necessary part of its total farming operations. (R. 35-36, 94).

14. Finding that appellant's mill operation is not a subordinate part of farming. 97 F. Supp. at 223.

This finding is clearly erroneous because in conflict with the evidence, which shows that in terms of effort as represented by hours of labor and in terms of expense as represented by operating charges, appellant's mill

operations were clearly subordinate to its cultivating, irrigation, harvesting, and other general field operations. (R. 178).

15. Findings that the activities of appellant's employees, including appellee Carrit, which were performed in connection with bagasse and the generation of electricity, are not a part of appellant's processing operations. 97 F. Supp. at 223; R. 216.

These findings are clearly erroneous because in conflict with the evidence, which shows that the activities in question were a necessary and integral part of appellant's processing operations. (R. 85 *et seq.*)

16. Finding that appellant's off-season operation preserves and enhances its capital investment. 97 F. Supp. at 224.

This finding is clearly erroneous, for there is no evidence in the Record to support it. The evidence shows only that the off-season operation was merely necessary repair and reconditioning work required to permit the mill to continue operating efficiently. (R. 109, 111, 112).

17. Finding that appellant's repair and service shop employees perform no work "of an agricultural nature, or at a time or place conjoint with or incidental to the farming process, or on a 'farm' " as that term is used in the Act. 97 F. Supp. at 225.

This finding is clearly erroneous because the work of appellant's repair and service shop employees constituted "farming" as well as "practices . . . performed by [appellant] or on [appellant's] farm as an incident to or in conjunction with [its] farming operations".

18. Finding that the work of appellant's repair shop employees is "not that of engaging in processing, or in any part of processing, nor is their work so integrated with processing as to be a portion thereof, incapable of segregation". 97 F. Supp. at 225.

This finding is clearly erroneous because the work of appellant's repair shop employees fell within the Section 7(c) processing exemption as being the work of "employees in [a] place of employment where [their employer] [was] . . . engaged . . . in the processing of . . . sugar cane . . . into sugar".

19. Finding that

> "Repair shop employees are not occupationally attached to the mill. The headquarters out of which they work is in each instance a separate structure, in which they generally perform the major portion of their work, to which they regularly report each day, and in which they receive supervision and instructions". 97 F. Supp. at 225.

This finding is clearly erroneous because in conflict with the evidence, which shows that most of the repair shop employees did not generally perform the major part of their work in the shops (appellees Oato (Stip. pp. 364-365, 367, 368-374), Reyher (Stip. pp. 524-537), A. Robello (Stip. pp. 571-585), Yamada (Stip. pp. 587-592), Mori (Stip. pp. 596-604), Sakai (Stip. p. 636), Kashiwabara (Stip. pp. 707-721). The district court itself made findings showing that some of these appellees did not generally perform most of their work in the shops. (R. 256, 259, 264, 273-274).

20. Finding that the repair shops constitute and are "self-sufficient units, operated not as an incident to any other operation exclusively or dominantly, but rather as an integral part of the over-all combination of separate enterprises jointly conducted by [appellant]". 97 F. Supp. at 225.

This finding is clearly erroneous because the repair shops were operated by appellant and on its farm "as an incident to or in conjunction with" its farming operations and were necessary to its cane growing and processing operations. (R. 94).

21. Finding that existing conditions are such that it has been necessary for appellant to furnish housing and community services to its production employees. 97 F. Supp. at 229.

There is no evidence in the Record to support this finding and it is therefore clearly erroneous.

22. Findings that (a) the appellant's villages "are located both in isolation and insulation from the rest of the Territory; these villages are located upon [appellant's] lands, and are many miles from any city" (97 F. Supp. at 229), and (b) "no other housing in adequate quantity, except that provided by [appellant], is shown to be available to [appellant's] employees". 97 F. Supp. at 229.

These findings are clearly erroneous, for the evidence in the Record shows that appellant's villages are within the limits of the City and County of Honolulu (R. 31) and adjacent to the built-up community of Haleiwa. (R. 119, 122, and 721). The evidence further shows that there are main highways running through the village areas on which employees might easily travel to and from nearby communities. (R. 64, 722).

23. Findings that (a) the maintenance of village facilities and dwelling repairs were carried on by appellant "as a part of its over-all production operations, not as a matter of mere convenience for its employees" (97 F. Supp. at 229); (b) "the operation and conduct of village facilities and housing are historically and presently an integral part of [appellant's] production effort" (97 F. Supp. at 229); and (c) "The work done by [appellant's] employees in maintaining and keeping in proper condition the housing occupied by its production workers, is neither trivial nor insignificant to [appellant's] business of producing sugar. It represents a material contribution to [appellant's] production of sugar. Without the performance of such repair and maintenance work, [appellant's]

housing and village facilities would fall into disrepair. Its employees would be unable to continue to occupy them, and there would be marked interference and damage to the continuation of production of goods for commerce". 97 F. Supp. at 231.

These findings are clearly erroneous, for there is no evidence in the Record to support them.

24. Finding that rental by appellant of houses on its plantation to non-employees is negligible. 97 F. Supp. at 229.

This finding is clearly erroneous because the evidence in the Record shows that of the 3,373 persons who lived on the plantation, 421, or 12½%, were lessees and their families who were not employees of the appellant. (R. 120-121).

25. Finding that after the 1946 conversion of housing and related domestic facilities into cash values, the employee paid back to the appellant the same amount as rental. 97 F. Supp. at 229.

There is no evidence in the Record to support this finding and it is therefore clearly erroneous.

26. Finding that ingress and egress to appellant's villages are subject to the appellant's control. 97 F. Supp. at 230.

There is no evidence in the Record to support this finding and it is therefore clearly erroneous.

27. Finding that

"While [appellant's] employees are not required under the collective bargaining agreement to live in company-owned houses, there is no evidence that they have any real choice over the matter. The possibility of purchasing homes of their own seems to be a remote and rare occurrence; the unique system of semi-feudal land tenure plays a role. Only to an inconsequential extent is it possible for employees to rent, at suitable locations near to their

places of work, houses owned by anyone other than [appellant]." 97 F. Supp. 230-231.

This finding is clearly erroneous, because in conflict with the evidence. Appellees' own witness testified that appellant's employees had a real choice or opportunity to purchase or rent homes in the community not owned or supplied by appellant. (R. 428-429, 430, 433). See also R. 601. Furthermore, some employees lived off the plantation in houses not owned or supplied by appellant. (R. 121). And the independent community of Haleiwa was located off the edge of appellant's plantation (R. 119).

28. Finding that the carpenters, painters, plumbers, and others working in connection with appellant's villages were covered by the Act "because they contributed to 'The maintenance of a safe, habitable building' . . . which was, in turn necessary to house, maintain, and keep in desired proximity to [appellant's] operations, employees whose work involved them directly in the production of goods for commerce". 97 F. Supp. at 232.

This finding is clearly erroneous because there is no evidence to support it.

29. Finding that as a general rule the engagement by appellees in non-exempt activities was substantial. 97 F. Supp. at 232.

This finding is clearly erroneous because all the work of appellees in every workweek during the period covered by the litigation was exempt under Section 13(a)(6) or Section 7(c) of the Act.

30. Finding that at times certain of the appellees attached to appellant's field operations department performed non-agricultural activities. (R. 190).

This finding is clearly erroneous because all the appellees, including those attached to appellant's field operations department, were engaged in agriculture and came within the agriculture exemption in the Act during each workweek covered by the litigation.

31. Findings that appellant owes various appellees certain specific amounts as overtime compensation under the Fair Labor Standards Act. (R. 193, 195, 197, 201, 204, 206, 208, 210, 212, 216, 218, 220, 223, 226, 231, 235, 239, 243, 248, 256, 257, 258, 263, 265, 273, 276, 278, 283, 284, 286, 288).

These findings are all clearly erroneous because in all workweeks affected by the controversy in this action, said appellees were either not engaged in interstate commerce or in the production of goods for interstate commerce or, if they were so engaged, were exempt from the overtime provisions of the Act under either Section 13(a)(6) or Section 7(c).

32. Finding that certain of the appellees worked in the mill "but not in the operation of processing machinery." (R. 212). This finding was directed particularly at appellees Oato (electrician who also worked in some workweeks in the power plant of the mill (R. 213)), Carrit (fire room employee (R. 216-218)), and S. Robello (power plant employee (R. 218-220)).

This finding is clearly erroneous, because the evidence shows that the fire room and power plant work of said appellees was an integral and necessary part of the appellant's processing operations. (R. 85-94).

33. Finding that "nothing . . . in the activities performed by [appellee Pacheco] was either agricultural, or part of the processing operation at the mill. As a laboratory technician, he was entitled to receive overtime, inasmuch as none of the pleaded exemptions are applicable." (R. 285).

This finding is clearly erroneous because this appellee, who did laboratory work in connection with appellant's field operations, came within the agriculture exemption in the Act in each workweek in controversy as to him.

APPENDIX B.

Brief of American Farm Bureau Federation as Amicus Curiae Previously Filed With This Court

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT.

No. 11952

WAIALUA AGRICULTURAL COMPANY, LIMITED,
A CORPORATION,
Appellant,

vs.

CIRACO MANEJA, ET AL.,
Appellees,

and

CIRACO MANEJA, ET AL.,
Appellants,

vs.

WAIALUA AGRICULTURAL COMPANY, LIMITED,
A CORPORATION,
Appellee.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF HAWAII.

BRIEF FOR AMERICAN FARM BUREAU FEDERATION AS AMICUS CURIAE.

STATEMENT.

On motion duly made, the American Farm Bureau Federation (hereinafter referred to as the Farm Bureau) was granted leave by this court on November 4, 1948, to file a brief as *amicus curiae* herein.

The Farm Bureau is a nonprofit corporation organized under the laws of the State of Illinois. It is a general farm organization of more than 1,250,000 farm families in 45 states of the United States and Puerto Rico.* The objects of the Farm Bureau are to promote, protect and represent the business, economic, social and educational interests of the farmers of the United States, and generally to develop agriculture. It sought and secured permission to file a brief herein in order to show to this court that the decision below, if sustained, would deprive not only sugar plantations in Hawaii but all farmers in the United States of the agricultural exemption in the Fair Labor Standards Act with respect to many activities which clearly fall within the language and purpose of that exemption.

We shall not review the facts in this case since they have all been stipulated by the parties and are set forth in the brief filed with this court by the appellant, Waialua Agricultural Company, Limited.

As we read the decision (R. 410-437) and judgment (R. 440-445) below, it destroys for American agriculture the very broad and carefully drawn exemption for "agriculture" appearing in sections 13(a)(6) and 3(f) of the Fair Labor Standards Act (hereinafter called the Act). The decision seems to attempt some distinction between mechanized and non-mechanized farming operations and between large and small farming operations. The decision denies the agricultural exemption to the many activities involved in the case which are common everyday activities

* The Farm Bureau has never had any membership in Hawaii.

performed by most American farmers and farms. Such activities are: (1) the hauling by the farmer of the farm's products to a storage place or a processing plant located either on or off the farm or to any market; (2) the hauling of fertilizer, seed, other agricultural supplies, and agricultural equipment from one part of the farm to another; (3) the hauling by the farmer of necessary farm supplies and equipment from a nearby town to the farm; (4) the maintenance, repair and operation by the farmer of his trucks and other hauling facilities, including maintenance of field roads on the farm; (5) the repair and overhauling by the farmer or on the farm of farm machinery, equipment and implements; (6) the feeding and shoeing by the farmer or on the farm of horses and mules used on the farm; (7) the maintenance and repair by the farmer or on the farm of farm buildings and grounds and tools and implements used in the farm operation; and (8) the processing by farmers or on the farm of agricultural products grown on the farm preparatory to marketing.

We contend that the above enumerated activities fall squarely within the agricultural exemption provided by the Act. If the decision and judgment below holding otherwise are sustained, then all American agriculture, and not only sugar cane farming, will be substantially deprived of the exemption which the Act grants. We therefore pray that this court reverse the decision and judgment of the court below insofar as it denies exemption to the above enumerated activities.

We shall now show that the language of the exemption provision, its legislative history, the case law and the administrative interpretations of the Administrator of the Wage and Hour Division thereunder unassailably establish that such activities are exempt under section 13(a)(6) of the Act.

ARGUMENT.

Employees Engaged in the Aforementioned Activities Are Employed in "Agriculture" Within the Meaning of Section 3(f) and Are Therefore Exempt From the Wage and Hour Provisions of the Act as Provided by Section 13(a)(6).

A. The Exemption Is Not Destroyed Because Farm Operations May Be Mechanized.

As the courts have recognized, the Act in section 3(f) contains a very broad, comprehensive and far reaching definition of the term "agriculture". *Addison* v. *Holly Hill Fruit Products,* 322 U. S. 607, 612; *Damutz* v. *Pinchbeck,* 158 F. (2d) 882, 883 (C. C. A. 2); *McComb* v. *Farmers Reservoir Co.,* 167 F. (2d) 911, 914 (C. C. A. 10). The definition does not distinguish between farming operations that are mechanized and those that are not mechanized, and the courts in the cases above cited have refused to recognize any such distinction. See also *Miller Hatcheries* v. *Boyer,* 131 F. (2d) 283, 285 (C. C. A. 8). If an employee comes within the statutory definition, he is exempt without qualification, whether his operation is conducted by hand or by extremely complex machinery. For the past 35 years or more there have been great technological advances in American agriculture and the United States Department of Agriculture has encouraged such technological advances. These have taken place in the case of many varieties of farming. *Hopkins, Changing Technology and Employment in Agriculture* (U. S. Department of Agriculture, 1941) p. 53. For example, the labor required on an acre of wheat in 1934-36 was half the amount needed in 1909-13. *Technology on the Farm* (U. S. Department of Agriculture, 1940) p. 61. As part of this trend toward greater productivity, each census since 1880, with few exceptions, has shown an increase in the average size of farms. The most noticeable increases were in the areas best suited to the

use of power equipment. *U. S. Census of Agriculture* (1945) Pt. II, p. 65. Approximately as of the date of enactment of the Fair Labor Standards Act, about 10% of the nation's farms accounted for 54% of the farm produce and 68% of the cash farm wage bill in the United States. Supp. Rep. 1012, Pt. II, Committee on Education and Labor, 79th Cong. 1st Sess., p. 77. The record in the present case demonstrates how these technological advances have taken place in the case of appellant's sugar plantation (R. 215-217).

When Congress enacted the Fair Labor Standards Act in 1938, it was presumably aware of these technological forward strides in agriculture. Had it intended to distinguish in the exemption for agriculture written into the Act between those farms which are not mechanized and those which are, it could quite easily have expressed such intent. It did not do so, but as we shall show, simply defined the term "agriculture" in functional terms. The court below, therefore, was completely in error in denying exemption to the agricultural activities of appellant on the ground that such activities are mechanized. Degree of mechanization is a factor of no relevance.

B. Section 3(f) Was Intended to Exempt Anything the Farmer Does In Connection With Growing and Marketing His Crop and in Addition Anything that Is Done on the Farm in Connection with Growing and Marketing the Crops of that Farm.

The definition starts with "farming in all its branches". It then proceeds to enumerate specific activities including preparation of the soil, growing of agricultural commodities, and harvesting of them. Finally the definition includes

> "any practices (including any forestry or lumbering operations) performed by a farmer *or* on a farm as an incident to *or* in conjunction with such farming

> operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market." (Emphasis supplied.)

Language could not be more clear to evince an intent to exempt all activities performed by the farmer or on the farm in connection with growing and marketing the farm's crops.

We consider briefly the terms "farm" and "farmer". Generally speaking the term "farm" means a tract of land or several tracts of land or fields owned or controlled by one or more persons and devoted to the production of agricultural products as a single enterprise under common management with common equipment and labor. Many farms consist of several and sometimes many separate tracts or fields. The operator of the farm has always been designated a "farmer." Most farmers are individuals. However, there are thousands of farming partnerships in the United States and in recent years it has been quite common for joint owners to incorporate rather than to operate as partners. All of such types of farmers are included within the membership of Farm Bureau.

Practically every farm in the United States, whether large or small, and whether it produces livestock, milk or grows grain, forage, crops, seed, cotton, fruits or vegetables, tobacco or any other agricultural commodity, engages in the activities which the court below held nonexempt. Almost all farmers, as part of their harvesting operations, haul their crops to a storage place or a processing plant located either on or off the farm or to some market. A great many of them conduct extensive processing operations upon their own crops. For example, many fruit and vegetable farmers pack and can their own fruits and vegetables; many cotton farmers gin their own cotton; and many dairy farmers process their own milk into butter and cheese. The apple farmer, for example, may haul his apples to a storage place on the farm or he may sort, wrap and pack the apples and otherwise prepare them

for market or he may can the apples in one form or another, or he may haul them to a packing plant off the farm to which he sells them. The grain farmer may haul his grain to a storage place on his farm or to a nearby elevator to which he sells same; the dairy farmer may haul his milk to a bottling plant on his own farm or to a nearby bottling plant to which he sells same, or he may process the fluid milk into butter and cheese on his own farm and then transport the same to market; the cotton farmer may haul his cotton to a gin located on or off the farm, and so forth. Unquestionably, when so performed, these are operations performed by a farmer or on a farm as an incident to or in conjunction with farming operations; *Redlands Foothill Groves* v. *Jacobs,* 30 F. Supp. 995 (S. D. Calif. 1940); *Damutz* v. *Pinchbeck,* 159 F. (2d) 882. All farmers likewise haul agricultural supplies and equipment to the particular field or fields of the farm where such supplies and equipment are to be used; all of them go to town with their trucks or other vehicles to pick up supplies and equipment for use on the farm; all do some maintenance work to keep in good usable condition their trucks or other hauling facilities, including the field roads on the farm; all do some repair work on their agricultural equipment, machinery and implements; many feed and shoe their horses and mules; and all do some maintenance and repair work on the farm buildings and grounds, and with tools and implements used in the farming operation. Without some or all of these various activities, no farm could grow or produce anything. Thus the decision below, if sustained, would apply to all farming and would effectively destroy the agricultural exemption for all farms and not only for the Hawaiian sugar plantations.

Furthermore, with respect to the various hauling activities, no distinction can be drawn on the basis of the medium used for such hauling. In some cases as in the case before the court here, the medium used for bringing in the sugar crops to the mill is a narrow gauge railroad,

although it appears from a recent Government report that many other methods of transportation are used on Hawaiian sugar plantations with a general trend toward large motor trucks. *The Economy of Hawaii in 1947,* Bureau of Labor Statistics, U. S. Department of Labor, Bulletin No. 926, p. 45. In the case of a small cotton or tobacco farmer, he may haul his cotton to the cotton gin or his tobacco to a tobacco stemmery by horse-drawn vehicle. In the case of a dairy farmer or a fruit farmer, he may haul his milk or fruit to a bottling plant or to a packing establishment by large truck. In many instances such trucks will be 10-ton or larger in size. We note that in the case at bar the rail cars on the narrow gauge railroad averaged only 4 and 3/4 tons per car gross cane (R. 157). We cannot conceive of any basis upon which the type of vehicle used in the hauling could make any difference in the application of the exemption. As an economic matter the farmer, consistent with his means, will use that mode of transportation best suited for his type of farming. In all cases, however, whatever the medium used, the hauling is simply an inseparable part of the farmer's operations of growing agricultural commodities, harvesting them and marketing them.

It is perfectly plain then that the statutory definition of agriculture when it refers to "farming in all its branches", "harvesting" and "practices . . . performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market", includes the activities listed *supra,* pp. 2, 3.

C. The Legislative History of Sections 13(a)(6) and 3(f) Confirms that all the Activities Here Described Were Intended to be Exempt.

As the bill which finally became the Fair Labor Standards Act worked its way through the legislative mill to final passage, repeated assurances were given that a full

exemption had been accorded to all activities performed by the farmer or on the farm in connection with the growing and marketing of the farm's crops. All agreed that the agricultural exemption was to be plenary and that all agriculture without exception was excluded from the coverage of the Act. It is obvious from the legislative history that the bill never would have become law but for such assurances and the consequent feeling on the part of the legislators that *all* agriculture was in fact exempt. 83 Cong. Rec. 7393, 9257.*

The bill (S. 2475) was introduced in the Senate on May 24, 1937 and was referred to the Senate Committee on Education and Labor, which wrote into the bill a broad definition of "agriculture" and then reported it to the Senate. *S. 2475, as reported in the Senate, July 6, 1937,* Sec. 2, pp. 50-51. Senator Black, Chairman of the Senate Committee in charge of the bill, stated to the Senate that the bill specifically excluded workers in agriculture of all kinds and of all types. 81 Cong. Rec. 7648. When he made this statement the agricultural definition in the bill, insofar as it related to practices incidental to farming operations, limited the exemption to those practices "ordinarily" performed by a farmer as an incident to farming operations.

In various colloquies between Senator Black and other Senators, the former made it clear that the exemption applied to all the things the farmer did with reference to producing his crops and marketing them—whether the crops were cotton, fruits or vegetables, or any other commodity. 81 Cong. Rec. 7657, 7658, 7659. Senator McGill then proposed an amendment which was adopted with the approval of the Labor Committee, which amendment provided that the agricultural exemption should apply not

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* We are not setting forth any part of the text of the debates as representative portions are contained in Appendix A of the Brief for Appellant (Pages 81 to 87, inclusive).

only to practices ordinarily performed *by a farmer* as an incident to his farming operations, but also to practices ordinarily performed *on a farm* as an incident to such farming operations. His amendment further added to the exemption for agriculture the activity of "delivery to market". The purpose of the McGill amendment, as explained by its author, was to exempt *all* kinds of labor performed on a farm so long as it was "incidental to agricultural purposes" and was merely preparatory to the marketing of *any* field crop and *all* kinds of labor performed in connection with making delivery to market of agricultural products. The discussions on Senator McGill's amendment are abundantly clear that such amendment was intended to apply to any commodity produced on a farm—peanuts, fruits and vegetables, grain, sugar cane, etc. 81 Cong. Rec. 7888, 7927, 7928-7929.

The language added to the agricultural definition by Senator McGill's amendment remained in the bill and was ultimately part of the bill as enacted. No activities are more essentially "incidental to agricultural purposes" than those we are presently discussing. To deny exemption to them as the court below effectively did is to flaunt the clearly expressed legislative purpose.

When the bill as passed by the Senate went to the House of Representatives, the House Labor Committee rewrote the agricultural exemption and purposely struck the word "ordinarily" from that part of the definition relating to incidental practices. H. Rep. No. 1452, 75th Cong., 1st Sess. pp. 4-5, 11. And the word "ordinarily" never again reappeared in the definition. The bill as it was first reported by the House Labor Committee was recommitted to such Committee and on April 21, 1938, another draft of S. 2475 was reported to the House. As so reported, once again the definition of "agriculture" was broadened by adding to the incidental practices portion of the definition the activities of "preparation for

market", "delivery to storage", and "delivery * * * to carriers for transportation to market". H. Rep. No. 2182, 75th Cong. 3rd Sess. p. 2. It was in this form that the bill was passed in the House.

If there had been any doubt theretofore that the hauling by a farmer of his crops to a storage place or to carriers to transport same to market was exempt, such doubt was completely eliminated by the addition of the foregoing phrases to the definition.

The two Houses of Congress then held a conference on the bill. In such conference they retained every amendment that had previously broadened the definition of "agriculture". But they went further. They broadened the exemption still more by exempting *all practices performed by a farmer or on a farm "in conjunction with such farming operations"*. 83 Cong. Rec. 9253-9254. This further broadening is additional confirmation that Congress intended to include in the exemption all of the activities we are discussing, since all of them are obviously performed by the farmer or on the farm *in conjunction with* the farming operations of growing crops. All of them are vital to the growing operation which could not otherwise take place.

When the conference report was debated in the Senate, Senator Thomas of Utah, who had succeeded Senator Black as Chairman of the Senate Committee on Education and Labor, and was chairman of the Senate conferees, stated that agriculture was exempted from the operation of the bill, that he did not know of any kind of agriculture that was included in the bill, and that the definition of agriculture was purposely made all-inclusive. 83 Cong. Rec. 9162-9163.

The legislative history will be searched in vain for any hint that Congress intended by the agricultural exemption to exempt only small farms doing their work with hand labor. On the contrary, there was discussion concerning

many highly mechanized operations and it was made plain by the proponents of the legislation that such operations would be exempt if they came within the definition. 81 Cong. Rec. 7656, 7657, 7658, 7659. Farm operations, unlike industrial operations, cannot be regulated by the clock. The coming and going of the seasons do not await the pleasure of man. Sunshine, rain, humidity and warmth are not yet subject to man's control. The time to plant and the time to harvest are determined by the whims of nature. Plant and animal growth continues around the clock. Successful farming demands long hours of labor on certain days and little or no hours of labor on others. Frost, heat, humidity, rainfall, relative day and night temperature, presence or absence of pests are the practical factors governing these demands. No limitation or regulation of the farmer's hours is possible in an efficient farming operation. This is the underlying reason for the agricultural exemption. See the testimony of various witnesses at the Joint Hearings on S. 2475 and H.R. 7200 (the related House bill) held in June, 1937, Pt. 3, 81 Congressional Record, pp. 1007, 1083, 1120-1121, 1133-1134. Senator McAdoo speaking on the floor of the Senate in support of an amendment to the definition of agriculture which would have exempted "any practices ordinarily performed by or for a farmer as an incident to such farming, including harvesting, packing, storing, or preparing for market, in the raw or natural state, any products derived from any of the above agricultural pursuits", stated the proposition thusly:

> "These agricultural commodities are highly perishable, and the work which must be done by the packing houses and on the farms varies greatly with temperature variations. Twenty-four hours in advance one cannot know whether the crop must be moved. So, to fix rigid hours of labor in such cases would be to ruin the producers, as the crop must be handled quickly with the workers available. The broadening of the definition as I have suggested is not only directly in

> line with the object of the bill but will also protect the farmers, who, in my State at least, are engaged in a method of marketing, packing, and handling their crops which may differ from the methods employed in other States." (8 Cong. Rec. 7927.)

Whether or not the farmer's operations are mechanized, the farmer must do his work when he can, depending upon natural factors. Consequently, the imposition of overtime requirements upon the farmer would not fulfill the purpose of the Act to induce employers to reduce hours of work and employ more men. See *Walling* v. *Youngerman Reynolds Hardwood Co.*, 325 U. S. 419, 423-424, and cases there cited. It would simply impose additional costs and other obligations upon the farmer without the beneficent results which Congress found would flow from the imposition of overtime requirements upon industry. Hence, Congress granted a complete exemption to all agriculture regardless of the mechanized character of the operation. The court below in its decision has ignored this Congressional purpose.

D. No Court Other Than the Court Below Has Denied Exemption to the Activities in Question.

The judicial decisions under the Fair Labor Standards Act fully support our position that the activities listed *supra*, pp. 2, 3, come within the agricultural exemption provided by the Act, and that it is irrelevant whether or not the farming operations are large or small, manual or mechanized. In addition to the cases cited on pages 4 and 7, *supra*, and those cited in the appellant's brief at pages 40-47, the court's attention is drawn to the following cases where the exemption was held applicable: *Jordan* v. *Stark Brothers Nurseries* (W.D. Ark. 1942), 6 Labor Cases ¶61,468 (employees of a nursery engaged in transporting trees from the fields where they were grown to a packing shed of the employer where they were sorted,

graded, and tied into bunches for shipment); *Walling* v. *Craig,* 53 F. Supp. 479, 483 (D. Minn. 1943) (repair and reconditioning of bulldozers, tractors, and trucks devoted to agricultural activities); *Walling* v. *Peacock Corp.,* 58 F. Supp. 880, 883 (E. D. Wisc. 1943) (handling and milling of onion sets by the employees of an employer who grows the onion sets); *Redlands Foothill Groves* v. *Jacobs,* 30 F. Supp. 995, 1006 (S. D. Calif. 1940) (packing by farmer of fruit he grows himself or bottling by a farmer of honey gathered on his farm); *Dye* v. *McIntyre Floral Co.,* 176 Tenn. 527, 144 S. W. (2d) 752 (1940) (employees of a nursery, who receive, care for, and prepare for shipment nursery products grown by the nursery or purchased from others); *Belt* v. *Hodges,* (N. D. Tex., 1941) 4 Labor Cases ¶60,664 (employee working for a farm implement dealer trading farm implements for livestock).

E. The Administrator of the Wage and Hour Division Has Consistently Held All of the Activities in Question to be Exempt Under Section 13(a)(6).

1. Hauling of Farm's Products to a Storage Place or a Processing Plant Located Either on or off the Farm or to Any Market.

(i) In *Interpretative Bulletin* No. 14, issued in August, 1939, 3 *C. C. H. Labor Law Reporter* (4th ed.) ¶24,488, the Administrator construing the agricultural exemption stated:

> "If a company has sugar cane fields and also a mill, the transportation of its own sugar cane to the mill seems an incidental practice which is included in this term" i.e. "practices * * * performed by a farmer * * * as an incident to or in conjunction with such farming operations". ¶10(f).

(ii) In an opinion letter written by him, the Administrator expressed the view that employees of an alfalfa

grower, who haul the alfalfa grown by that grower to a processing plant located off the farm, are exempt under section 13(a) (6). WHMan. (1944-45) p. 594.

(iii) In paragraph 5(a) of *Bulletin* 14, the Administrator stated that the term "harvesting of any agricultural or horticultural commodities", as used in section 3(f), includes all "operations customarily performed in connection with the removal of the crops by the farmer from their growing position in the field, greenhouse, etc."

(iv) In paragraph 10(c) of the Bulletin, the Administrator stated as follows with respect to the term "delivery to storage" appearing in the definition of "agriculture":

> "The term 'delivery to storage' includes taking the commodities, dairy products, . . . to the places where they are to be stored or held pending preparation for or delivery to market".

(v) In paragraph 10(d) of the *Bulletin,* the Administrator stated as follows with respect to the term "delivery . . . to market" appearing in the definition of "agriculture":

> "The term 'delivery . . . to market' includes taking the commodities, dairy products . . . to market".

(vi) In paragraph 10(e) of the *Bulletin,* the Administrator stated as follows with respect to the term "delivery * * * to carriers for transportation to market" appearing in the definition of "agriculture":

> "The term 'delivery . . . to carriers for transportation to market' includes taking the commodities, dairy products . . . to a carrier—truck, railroad, ship, etc.—for transportation by such carrier to market".

(vii) In paragraph 10(f) of the *Bulletin,* the Administrator stated that besides the practices listed in the statute as being incident to or in conjunction with farming operations, there are other practices included within the exemp-

tion. As one such practice he mentioned the actual selling of the agricultural or horticultural commodities, etc.

All of the foregoing opinions relate to hauling and marketing activities performed by the farmer. The Administrator, however, has also recognized that if hauling activities are confined to a particular farm and consist of hauling on that farm the crops grown thereon to a storage place or processing plant located on that farm, the agricultural exemption also applies to such hauling activities. Thus in paragraph 11 of his *Bulletin* No. 14, he dealt with the term "practices . . . performed . . . on a farm as an incident to or in conjunction with such farming operations" appearing in the definition of "agriculture". He stated that with the exception of "delivery to market", which necessarily involves working off the farm, the practices described in paragraph 10 of his *Bulletin,* even if performed by employees of someone other than the farmer, would be exempt so long as they were performed on the farm. And as we have already seen, among the practices he described in paragraph 10 of his *Bulletin* were those of hauling crops to a storage place, processing plant or a carrier for transportation to market.

2. Hauling by the Farmer of Necessary Farm Supplies and Equipment from a Nearby Town to the Farm.

In paragraph 10(f) of his *Bulletin* No. 14, the Administrator stated:

> "The truck drivers working for a farmer, who haul garbage and feed to the farm for feeding pigs, also perform practices that are exempt."

This example shows plainly that in the Administrator's view the hauling by the farmer's employees of agricultural supplies and equipment to the farm for use in the farming operations is exempt.

3. Operations Functionally Necessary to Farming Performed by the Farmer or on the Farm.

Included among such operations are the hauling of fertilizer, seed, other agricultural supplies and agricultural equipment from one part of the farm to another; repair and maintenance by the farmer or on the farm of the farmer's hauling facilities, including field roads on the farm; repair by the farmer or on the farm of farm machinery, equipment and implements; feeding and shoeing by the farmer or on the farm of horses and mules used in the farm operations; and maintenance and repair by the farmer or on the farm of farm buildings and grounds and tools and implements used in the farming operation.

In paragraph 12 of *Interpretative Bulletin* No. 14, the Administrator said as follows:

> "We have received inquiries concerning office help—secretaries, clerks, bookkeepers, etc.—night watchmen, maintenance workers, engineers, etc., who are employed by a farmer or on a farm in connection with the activities described in the definition of 'agriculture' contained in section 3(f). In our opinion such employees are exempt."

It is clear from this statement that the employees engaged in the above activities, all of which are not only performed in connection with the production and growing of agricultural commodities but are indispensable to such production and growing, are in the Administrator's opinion exempt.

In addition to the opinion expressed in paragraph 12 of his *Bulletin* No. 14, the Administrator and his attorneys have expressed other opinions showing that any activities performed by the farmer or on the farm in connection with the growing and marketing of the farm's crops are exempt. Thus they have held the following activities to come within the agricultural exemption.

(i) The erection of a silo on a farm by employees of an independent contractor. *Interpretative Bulletin* No. 14, par. 11.

(ii) The removal of stumps by employees of an independent contractor from cut over timber land owned by a lumber company and now devoted by the lumber company to the growing of tung trees, where such removal and the plowing and fertilizing of the ground around the tung trees was necessary to the proper growth of the trees. WHMan. (1944-45) p. 592.

(iii) Sorting, grading, sizing and other practices performed on tobacco on the farm where grown by a company in the business of buying, warehousing and marketing tobacco, to which the farmer sells his tobacco. WHMan. (1944-45) p. 593.

(iv) Work on the farm by field men of a cannery to which the farmer had contracted to sell his crops, notwithstanding such field men from time to time report to the canning plant. 3 *C. C. H. Labor Law Reporter* (4th ed.) par. 25,242.203.

(v) Pre-cooling operations on the farm with respect to fruits and vegetables grown on the farm. 3 *C. C. H. Labor Law Reporter* (4th ed.) par. 25,242.21.

(vi) Logging operations performed by the farmer or on his farm with respect to timber blown down in a hurricane, which fallen timber presented a fire hazard and an impediment to the cultivation of the land. 3 *C. C. H. Labor Law Reporter* (4th ed.) par. 25,242.252.

(vii) Vining of peas grown on a farm by a vinery located thereon. 3 *C. C. H. Labor Law Reporter* (4th ed.) par. 25,242.281.

(viii) Tobacco stemming by a farmer or on a farm. 3 *C. C. H. Labor Law Reporter* (4th ed.) par. 25,242.344.

4. Preparation for Market of Products Grown on the Farm.

In paragraph 10(b) of *Bulletin* No. 14 the Administrator stated:

"(b) The term 'preparation for market' must be treated differently with respect to various commodities. The following activities, among others, when performed by a farmer, seem to be included within the term:

1. Grain, seed, and forage crops.—Weighing, binning, stocking, cleaning, grading, shelling, sorting, packing and storing.

2. Fruits and vegetables.—Assembling, binning, ripening, cleaning, grading, sorting, drying, preserving, packing, storing, and canning.

3. Nuts (pecans, walnuts, peanuts, etc.).—Grading, cracking, shelling, cleaning, sorting, packing, and storing, unshelled nuts; and performing the same operations except cracking and shelling, upon the nut meats.

4. Sugar.—Manufacturing raw sugar, cane, or maple syrup and molasses.

5. Eggs.—Handling, cooling, grading, and packing.

6. Wool.—Grading and packing.

7. Dairy products.—Salting, printing, wrapping, packing, and storing butter; ripening, molding, wrapping, packing, and storing cheese; and canning or packing any other dairy product.

8. Cotton.—Weighing, ginning, and storing cotton; hulling, delinting, cleaning, sacking, and storing cottonseed.

9. Nursery stock.—Handling, wrapping, packaging, and grading.

10. Tobacco.—Handling, drying, bulking, stripping, tying, sorting, stemming, packing, and storing.

11. Livestock.—Handling and loading.

12. Poultry.—Culling, grading, cooping, and loading.

13. Honey.—Assembling, extracting, heating, ripening, removing comb, straining, cleaning, grading, weighing, blending, packing, and storing.

14. Fur.—Removing the pelt, scraping, drying, putting on boards and packing."

5. American Farmers Have Relied Upon the Interpretations of the Administrator in Regarding Their Various Farm Activities as Exempt.

According to a press release issued by the Administrator at the same time as Interpretative Bulletin No. 14, the Administrator's interpretations of the agricultural exemption in the Act were made only after lengthy conferences with representatives of employers, employees and other interested parties. Authorities of the United States Department of Agriculture were also consulted. Much time was devoted by the Administrator's attorneys to a study of the legislative history of Section 13(a)(6). The Administrator also had his economists make economic studies in order to assist in a proper determination of the scope of the exemption. It was only after these lengthy investigations and discussions that the Administrator announced his opinions on the subject. Such opinions were widely circulated through *Interpretative Bulletin* No. 14, press releases and other releases to the various labor law publications.

Once the Administrator's interpretations were announced, the farmers of America relied upon such interpretations and were guided by them in compensating their employees. And such interpretations as above set forth were never modified. Since they comport with the language and spirit of the exemption provisions they should be accorded the respect which the Supreme Court has said are due the Administrator's interpretations. *United States* v. *American Trucking Ass'n. Inc.*, 310 U. S. 534, 549. As the Supreme Court has also said, employers may properly resort to such interpretations for guidance.

Skidmore v. *Swift,* 323 U. S. 134, 140. They should not be lightly discarded, as was done by the court below, in favor of wholly new interpretations, of which the farmer never before heard.

F. The Imposition of the Wage and Hour Requirements of the Act with Respect to the Activities in Question Would Create a Huge Retroactive Liability for the American Farmer.

Since the language and purpose of the agricultural exemption in the Act appear clearly to grant exemption from the wage and hour requirements thereof to the activities in question, and since the courts and the Administrator have consistently indicated that such activities are exempt, the American farmer has naturally assumed that they are in fact exempt. If now, ten years after the Act has gone into effect, he is to find that contrary to all indications many of his activities are not entitled to exemption, the retroactive liability to employees, if susceptible of measurement, could be enormous. The relationship between farmer employer and farm employee is more than an arrangement of employment, it is also a social arrangement. Farming is a way of life. Usually the farm employee (and often his family with him) lives upon the farm. Often he has the privilege of producing on the farm commodities for his own consumption as well as other privileges. His interest in the farm cannot be limited to some eight, nine or ten hours each day. On most days there is no way to measure the number of hours the farm employee has devoted respectively to his employer's interests and to his personal interests. There is in most operation no satisfactory basis for the keeping of time records. Farm employees are actually on the farm available for work many hours. If the Fair Labor Standards Act is now to be construed so that agriculture will not be

exempt the retroactive liability to employees could be so measured as to mean bankruptcy to a large number of farmers.

Conclusion

For the foregoing reasons, the farm activities described herein should be held exempt under the definition of "agriculture" in the Fair Labor Standards Act.

Respectfully submitted,

Donald Kirkpatrick,
General Counsel, American Farm Bureau Federation,
109 N. Wabash Ave.,
Chicago 2, Ill.

Of Counsel:
Paul E. Mathias,
Harry Meloy,
George E. Merker, Jr.,
43 East Ohio St.,
Chicago 11, Ill.

APPENDIX C.

Legislative History of Secs. 13(a)(6) and 3(f).

1. *Senator Black's statement opening debate in the Senate on S. 2475.*

"We have placed together in the bill definitions of agricultural work which have been fixed from time to time in other legislative enactments, and in addition to that we have drawn liberally from Mr. Webster's definition of agriculture." 81 Cong. Rec. 7648.

2. *Statement of Senator Schwellenbach that packing by a farmer of his own grown apples was exempt under the bill.*

"When an apple grower picks his apples and takes them into his own warehouse . . . and in that warehouse packages them and then stores them, or perhaps first stores them and then packages them, the work being done by the farmer on his own farm, there is *no dispute about the fact that it is an agricultural operation.* . . . It seems to me that the bill, under the definitions as they now stand, places at a considerable disadvantage the man who is too small an operator to perform these operations upon his own farm. . . . The picking of the apples is an agricultural process. If the man does it on his own ranch, the storing of the apples and the washing of the apples and the packing of the apples are all agricultural processes" [Emphasis supplied] 81 Cong. Rec. 7659. To get at the situation about which he was complaining, Senator Schwellenbach later introduced an amendment to provide an exemption for persons employed within the area of production "in preparing, packing, or storing . . . fresh fruits or vegetables in their raw or natural state" (*Id.*, p. 7876). This amendment was adopted (*Id.*, p. 7949).

3. *Debate in Senate on processing of sugar cane.*

"Mr. Overton. Let me invite the attention of the Senator to another agricultural industry in connection

with which the processing, if it may be so called, by the farmer of his own product is much more general than in the case of the farmer ginning his own cotton. I refer to the sirup-cane producer who processes his own cane, grinds it, and makes it into sirup. Does he come within the provisions of the bill?

* * * * * * *

"Mr. Black. The Senator can read the definition in *the bill and note that those things ordinarily done by farmers on the farm do not come under the provisions of the bill.*

"Mr. Pepper. Mr. President, I wonder if the following language would not answer the questions of the Senator from Louisiana. It is found on page 51 of the bill, lines 13 and 14, being a part of the agricultural definition: 'And any practices ordinarily performed by a farmer as an incident to such farming operations.'

"Mr. Overton. It may and it may not. I was asking the Senator from Alabama because he is the author of the bill, and I was giving a concrete case . . . I have taken the case of a farmer who *plants his sugarcane, gathers it, and who on his own farm has a sirup mill and converts the juice of the cane into sirup. Does he come within the provisions of the bill?*

"Mr. Black. *The definition provides that those things done by the farmer ordinarily on his farm* constitute a part of his farming business. It would *depend upon whether or not that was an ordinary incident to that type of farming business in the State where sirup is made. If so, that would be agriculture under the definition of the bill.*

* * * * * * *

"Mr. Overton. It would not be considered an ordinary practice performed by a farmer as an incident to his farming operations for the reason that we also have large sirup mills. Such sirup mills gather in the cane produced by the different farmers and process it into sirup. But it is of frequent occurrence that a farmer has a mill on his own farm and converts his own cane juice into sirup. With that explanation,

would the Senator say the practice of such a farmer is one ordinarily performed by a farmer as an incident to his farming operations?

"Mr. Black. If the Senator says it is a practice not ordinarily performed by a farmer as incident to his farming operations, I would necessarily say it was a practice not ordinarily performed by a farmer as incident to his farming operations, and therefore would not come under the definition. I am assuming it is a practice which is not ordinarily engaged in, by farmers.

"Mr. Overton. Not altogether engaged in, but frequently engaged in by farmers.

"Mr. Black. For instance, a farmer might build on his farm a factory for the purpose of manufacturing shirts and sending them through the United States. Since that is a practice not ordinarily engaged in by farmers on their farms, naturally that would not be considered a farming activity.

"Mr. Overton. *Let us take the sugar manufacturer. On some plantations there are mills in which the planters may manufacture their own cane into sugar. Would they come within the provision of the bill?*

"Mr. Black. *As I said, it would depend upon whether or not that comes within the definition under the facts of operation, whether it is a necessary incident to that type of cane farming . . .*

* * * * * * *

"Mr. Overton. As I understand the Senator, in cases where some farmers process their own products and other farmers carry their products to some processor to be processed, then by reason of the fact that some farmers carry their products to a processor to be processed, the farmers who process their own products would not be considered as engaging in a practice which is ordinarily incident to farming operations.

"Mr. Black. I could not say as to that. It depends altogether on the facts as to what is a necessary incident to farming. As I said, there are some things so far removed from farming that all of us would know instantly they did not constitute a farming operation.

The illustration I gave was of a farmer erecting on his farm a factory and manufacturing anything you please, whether something he grows or not, who employs many people to manufacture it, and then ships it in interstate commerce. The mere fact that he has such a plant on his farm would not make the manufacturing of shirts, for instance, a farming operation. It would still be a manufacturing operation. The same reasoning would apply to any other process of manufacturing" [Emphasis supplied]. 81 Cong. Rec. 7657-7658.

4. *Debate on Senator McGill's amendment to provide that the agricultural exemption should apply (1) to practices performed on a farm as an incident to farming operations and (2) to "delivery to market."*

"Mr. McGill. Mr. President, the purpose of the amendment is to broaden the definition of 'employee' as applied to agriculture. I can readily see how some have construed the language of the bill to mean that one who operates a thrashing [sic] machine outfit and employs a crew and is employed by a farmer to thrash [sic] his wheat might be included under the provisions of the bill. *Likewise, those who are engaged in harvesting and delivering to market might be included.* It is my understanding, although no definite commitment has been made, that the amendment is not opposed by those in charge of the bill. If I am correct, I should like to have the amendment agreed to.

* * * * * * *

"Mr. George. Is it the purpose of the amendment to exempt those who thresh grain?

"Mr. McGill. Those who thresh grain, who harvest grain and *deliver it to market.*

"Mr. George. Would the amendment also *apply to the harvesting of any other crop?*

"Mr. McGill. *It would apply to any commodity produced on a farm.*

"Mr. George. Would it apply to peanut pickers who pick in the fields?

"Mr. McGill. Yes.

"Mr. George. *And who move peanuts to the market?*

"Mr. McGill. *Yes;* that is my understanding.

"Mr. George. I should like to ask the Senator from Alabama if that is his interpretation of the amendment.

"Mr. Black. *That is my interpretation of the amendment,* and is it my belief that the bill as originally drawn covers what is now contained in the language of the amendment; but some Senators who were doubtful about it wished to draw a clarifying amendment.

"Mr. George. I am sure it does not in fact do so, because the picking of peanuts and the harvesting of grain in my part of the country are done purely by contract with outsiders, who in a great many cases have no farm interest. What I want to get at is whether, in the opinion of the Senator from Alabama, the language of the amendment of the Senator from Kansas includes any field crop that is threshed, as in the case of grain, or picked, as in the case of peanuts in the field.

"Mr. Black. *Unquestionably.*

"Mr. McGill. I may say to the Senator from Georgia and other Senators that it is my object to make the language of the amendment broad enough to include all work done on a farm, *so long as it is incidental to agricultural purposes.*

"Mr. George. *And so long as it is merely preparatory and necessarily preparatory to the marketing of the field crop.* Is that true?

"Mr. McGill. *That is true; and the language would also include all labor performed in making delivery to market.*

"Mr. George. I thank the Senator.

"Mr. Copeland. Of course, that would take care of my apple man, about whom I have been worrying, would it not? *It would take care of the farmer who takes his crop of apples to the market, would it not?*

"Mr. McGill. That is correct. [Emphasis supplied]. 81 Cong. Rec. 7888.

5. *Debate on amendment proposed by Senator McAdoo.*

Senator McAdoo proposed an amendment, substituting for the language in the definition of agriculture relating to practices ordinarily performed in connection with farming operations, the following:

> "Any practices ordinarily performed by or for a farmer as an incident to such farming, including harvesting, packing, storing, or preparing for market, in the raw or natural state, any products derived from any of the above agricultural pursuits." 81 Cong. Rec. 7927.

The following discussion ensued:

> "Mr. McGill. Yesterday afternoon the Senate amended the lines to which the Senator's amendment applies by inserting in line 13, after the word 'farmer,' the words 'or on a farm,' and also by inserting in line 14, after the word 'operations,' the words 'including delivery to market,' *it being the purpose of these amendments to exclude from the bill all labor performed on a farm*, whether by contract with the farmer or otherwise, and to *exclude all labor connected with the delivery to market of commodities produced on a farm*. . . .
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> * * * * * * *
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> ". . . I will state that I feel the amendment adopted yesterday is broader than the amendment proposed by the Senator from California, by virtue of the fact that no limitation was placed in the amendment adopted yesterday, such as mentioning harvesting, packing, and operations of that character. *The amendment adopted yesterday was intended to include, and, I think, it does include, all kinds of labor performed on a farm and all kinds of labor in connection with delivering agricultural products* to market. In my judgment it includes more than does the amendment proposed by the Senator from California and is broader in its terms. I hope that the amendment adopted yesterday will remain in the bill and that the amendment of the Senator from California, by virtue

of the narrower terms carried in it, will be rejected.

"Mr. George. I suggest to the Senator from California that, in my opinion the amendment offered by the Senator from Kansas [Mr. McGill] yesterday is broader than his amendment, because it takes care of all operations, whether performed by cooperatives or by persons under contract or by persons who have merely been employed for a particular job. To enumerate even them in a succeeding clause, or to recite the things that are included, would thus, of course, under the well-known rule of construction, form a limitation upon what is first stated as a broad general proposition. I think the Senator's purpose is absolutely accomplished by the amendment offered yesterday by the Senator from Kansas.

"I may say to the Senator from California that I had in mind precisely what he has in mind, but with reference to different products. After examining the amendment of the Senator from Kansas I concluded that it covered all those cases as well as the cases which I think the Senator himself has in mind" [Emphasis supplied]. *Id.*, pp. 7927, 7928-7929.

6. *Debate on Conference Report between Senator Thomas and Senator Johnson.*

"Mr. Johnson of California. *I take it from what the Senator has said that the agricultural exemptions are practically plenary, and take in almost all agricultural products.*

"Mr. Thomas of Utah. I could not hear part of the Senator's sentence.

"Mr. Johnson of California. *I said that, in general language, agriculture is exempted from the operation of the bill.*

"Mr. Thomas of Utah. *It is.*

"Mr. Johnson of California. *Does the Senator know of any particular kind of agriculture that is included in the bill?*

"Mr. Thomas of Utah. *I do not know of any. The definition seems to be all-inclusive, and we tried to make it so*" [Emphasis supplied]. 83 Cong. Rec. 9162-9163.

APPENDIX D.

Administrator's Interpretations of Section 7(c).

1. *Distinction drawn between Sec. 7(c) exemptions referring to an entire industry and Sec. 7(c) exemptions referring to particular operations in an industry.*

> "The exemption thus granted to cottonseed processing differs from that granted in the same section of the Act to certain operations upon livestock. The latter exemption appears limited to certain particular operations, since Sec. 7(c) does not use any term descriptive of the meat packing industry, but uses only words describing certain particular operations in such industry. With this distinction in mind *it appears to us that all employees working in a plant engaged in processing cottonseed are within the exemption,* while this would not be true of all employees working in a plant engaged in handling, slaughtering or dressing livestock. In the latter case only the employees engaged in the enumerated operations or in operations that are an integral part thereof would be exempt" [Emphasis supplied]. Opinion Letter of Administrator written on July 9, 1941, set forth with approval in *Abram* v. *San Joaquin Cotton Oil Company,* 49 F. Supp. 393, 401 (S.D. Calif. 1943).

2. *Paragraphs 18 and 22 of Interpretative Bulletin No. 14.*

> ". . . The term 'raw sugar' describes the product of the first processing of sugar cane, which product normally is thereafter refined before it is consumed. The processing of sugar cane into raw sugar is within the exemption; . . ." ¶18.
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> * * * * * * *
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> ". . . truck drivers who carry raw materials to the establishment or who transport goods upon which the exempt operation has been performed may be considered as working in the 'place of employment', for they make regularly recurring trips to and from the establishment and may be deemed attached thereto.

Further, some of their work, such as loading and unloading, takes place in the establishment. . . ." ¶22.

3. *Interpretations as to which employees of a processor are exempt under Section 7(c).*

"When an establishment is *exclusively* engaged in performing operations specifically mentioned in Sec. 7(c), every employee working in such a plant either will be actually engaged in the described operations, or else will be engaged in an occupation which is a necessary incident to the described operations and working solely in a portion of the premises devoted by his employer to such operations. *Therefore, when an establishment is exclusively engaged in activities enumerated in the section, all of the employees of the operator of the establishment who work solely in that establishment, including office employees, watchmen, maintenance workers and warehousemen, come within the scope of these exemptions. In such a situation, the exemptions also apply to those employees of the plant operator whose duties consist of hauling agricultural commodities from the fields or from receiving stations to the plant for packing or processing, and to those who transport to market or to carriers for transportation to market goods upon which exempt operations have been performed in the plant"* [Emphasis supplied]. WHM 35:551.

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"Where an establishment is solely engaged in the canning of fresh fruits and vegetables, the labeling, stamping and boxing of the canned goods during the active season by employees of the canner *are exempt operations if performed in the cannery or in a warehouse located on the same premises as the cannery.* On the other hand, activities performed in a warehouse located on premises separate from the cannery, are not conducted in the place of employment where the canning is done, and the exemption is inapplicable to all of the employees working in such a warehouse" [Emphasis supplied]. *Id.*, p. 553.

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". . . where an establishment is *solely* engaged in the packing of fresh fruits or vegetables and refrigerator cars are spotted on tracks adjoining the plant, the employees of the packer engaged in bunker icing or in cooling cars solely for use in shipping fresh fruits and vegetables packed in that establishment are exempt" [Emphasis supplied]. *Id.,* p. 554.

* * * * * * *

"If the plant is used *solely* to pack fresh fruits and vegetables, the assembling of box shook by employees of the packer is exempt when performed during the active season *solely in the packing plant or in a warehouse located on the same premises*" [Emphasis supplied]. *Id.*

* * * * * * *

"At present, if an establishment is engaged exclusively in the operations exempted under section 7(c), generally speaking all employees employed in that establishment are exempt from the overtime provisions of the act for either the entire year or 14 weeks a year, depending on the particular activities involved. This includes office, custodial and maintenance employees." Statement of Secretary of Labor Schwellenbach submitted to Senate Committee on Labor and Public Welfare, *Hearings on S. 2386 and other bills,* 80th Cong. 2nd Sess., p. 183.

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An Opinion of the Wage-Hour Division, dated March 18, 1941, held that the Sec. 7(c) exemption applied to field men employed by canneries to supervise the production and harvesting of raw products purchased under acreage contracts. These men, like employees transporting cane to the mill in the instant case, spend most of their time in the fields but they make the cannery their headquarters and make regularly recurring trips to and from the cannery. The Division held that they should be considered as working in the "place of employment". 3 C. C. H. Labor Law Reporter, ¶25,250.255. Another Opinion Letter, dated March 18, 1941, held that the Sec. 7(c) exemption applies to pea vining stations if the work per-

formed at the vineries and the cannery, to which vined peas are thereafter removed, is performed as part of a continuous series of operations throughout which the peas remain perishable. 3 C. C. H. Labor Law Reporter ¶25,250.32.

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In the Administrator's press release answering certain questions about the application of the Sec. 7(c) exemption to canneries, he pointed out that a truck driver engaged solely in transporting canned citrus from a cannery to market was within the exemption and must be regarded as employed in those portions of the establishment devoted by the employer to the operations described in Sec. 7(c), i.e. the canning of fresh fruits and vegetables. WHM 35:763

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An opinion of one of the Administrator's attorneys, appearing in WHM 35:772, declared that the Sec. 7(c) exemption for processing cottonseed applied not only to the oil mill in which the cottonseed was crushed but also to a storage house, in which hulls removed from the cottonseed and cottonseed meal were stored.

APPENDIX E

Administrator's Allowance of Tolerance of Non-Exempt Work in the Case of Most Exemption Provisions in the Act.

In the case of the following exemptions, the Administrator has allowed the indicated percentage of non-exempt work in a workweek without loss of the exemption:

Sec. 13(a)(1) exemption for executives, administrative employees, professionals, local retailing capacity employees and outside salesmen—20%.[1]

Sec. 13(a)(2) exemption for retail establishments—25%.[2]

Sec. 13(a)(3) [now Sec. 13(a)(14)] exemption for seamen—20%.[3]

Sec. 13(a)(4) [now Sec. 13(b)(3)] exemption for carriers by air—20%.[4]

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[1] Regulations, Pt. 541, Subpart A, Title 29, Ch. V. Code of Fed. Reg. (14 F.R. 7705) §§ 541.1(e), 541.2(d), 541.3(d), 541.4(b) and 541.5(b); 3 C.C.H. Labor Law Reporter ¶¶23,301.01(e), 23,301.02(d), 23,301.03(d), 23,301.04(b), 23,301.05(b); WHM 20:3-5. See too *Knight* v. *Mantel*, 135 F. (2d) 514, 517-518 (C.C.A. 8), *Bender* v. *Crucible Steel*, 71 F. Supp. 420, 425 (W.D. Pa. 1947), both of which applied the 20% test. See also *Walling* v. *General Industries*, 330 U.S. 545, 547; *Atkinson Co.* v. *Lassiter*, 162 F. (2d) 774, 777 (C.C.A. 9), judgment vacated on other grounds, 166 F. (2d) 144; and *Helliwell* v. *Haberman*, 140 F. (2d) 833, 834 (C.C.A. 2) which seem to approve the 20% test.

[2] As explained, *supra* p. 77, footnote 48, the 1949 amendments specifically wrote the 25% test into the law for retail establishments. The tolerance referred to in the text was that permitted by the Administrator prior to such amendments.

[3] Title 29, Ch. V, Code of Fed. Reg., Pt. 783 (13 F.R. 1376, 14 F.R. 3678), § 783.4; 3 C.C.H. Labor Law Reporter ¶ 24,109.50; WHM 15:547.

[4] Title 29, Ch. V, Code of Fed. Reg., Pt. 786, Subpart A (13 F.R. 1376) § 786.1; 3 C.C.H. Labor Law Reporter ¶ 24,112.01; WHM 15:15.

Sec. 13(a)(5) fishery exemption—20%.[5]

Sec. 13(a)(8) exemption for local newspapers—49.999%.[6]

Sec. 13(a)(9) exemption for street, suburban, etc. railways and local trolley and motor bus operators—20%.[7]

Sec. 13(a)(11) exemption for switchboard operators—20%.[8]

Sec. 13(a)(15) exemption for forestry or logging operations in which not more than 12 employees are employed—20%.[9]

Sec. 13(b)(2) exemption for employees of employers subject to Pt. I of the Interstate Commerce Act—20%.[10]

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[5] Title 29, Ch. V, Code of Fed. Reg., Pt. 784 (13 F.R. 1376) § 784.1; 3 C.C.H. Labor Law Reporter ¶ 24,110.01; WHM 15:82.

[6] 3 C.C.H. Labor Law Reporter ¶¶ 25,260.05 and 25,260.34; WHM 15:313. The 49.999% test was also applied in *Robinson* v. *North Arkansas Printing Co.*, 71 F. Supp. 921, 923 (W.D. Ark. 1947).

[7] Title 29, Ch. V, Code of Fed. Reg., Pt. 786, Subpart B (13 F.R. 1376) § 786.50; 3 C.C.H. Labor Law Reporter ¶ 24,112.50; WHM 15:147.

[8] Title 29, Ch. V, Code of Fed. Reg., Pt. 786, Subpart C (13 F.R. 1376) § 786.100; 3 C.C.H. Labor Law Reporter ¶ 24,112.100; WHM 15:687.

[9] Title 29, Ch. V, Code of Fed. Reg., Pt. 788, § 788.7; 3 C.C.H. Labor Law Reporter ¶ 24,114.07; WHM 15:110.

[10] Title 29, Ch. V, Code of Fed. Reg., Pt. 786, Subpart D (13 F.R. 1376) § 786.150; 3 C.C.H. Labor Law Reporter ¶ 24,112.150; WHM 15:345.